(21)

No. 99-1728-CFX Title: United States, Petitioner
v.
Frederick W. Vopper, aka Fred Williams, et al.

Docketed: April 27, 2000
Court: United States Court of Appeals for the Third Circuit

Vide:
99-1687

Entry	Date	Proceedings and Orders
	Apr 27 2000	Petition for writ of certiorari filed. (Response due May 27, 2000)
	May 30 2000	Brief of respondents Frederick W. Vopper, et al. in opposition filed. VIDED.
	May 30 2000	Brief of respondent Jack Yocum in opposition filed. VIDED.
	Jun 6 2000	DISTRIBUTED for Conference of June 22, 2000
	Jun 8 2000	Reply brief of petitioner United States filed.
	Jun 19 2000	REDISTRIBUTED for Conference of June 22, 2000
	Jun 26 2000	Petition GRANTED. The case is consolidated with No. 99-1687, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT December 5, 2000. **********
	Jul 20 2000	Order extending time to file brief of petitioner on the merits until September 6, 2000.
	Jul 21 2000	Order extending time to file respondents' brief on the merits to and including October 25, 2000.
	Aug 14 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for Jack Yocum.
	Sep 6 2000	Joint appendix filed. VIDED.
	Sep 6 2000	Brief of petitioners Gloria Bartnicki and Anthony F. Kane, Jr. filed. VIDED.
	Sep 6 2000	Brief of petitioner United States filed. VIDED.
	Sep 6 2000	Brief amicus curiae of Cellular Telecommunications Industry Association filed. VIDED.
	Sep 28 2000	Record filed.
	Oct 25 2000	Brief of respondents Frederick Vopper, et al. filed. VIDED.
	Oct 25 2000	Brief of respondent Jack Yocum filed. VIDED.
	Oct 25 2000	Brief amici curiae of WFAA-TV and Robert Riggs filed. VIDED.
	Oct 25 2000	Brief amicus curiae of James A. McDermott filed. VIDED.
	Oct 25 2000	Brief amicus curiae of Liberty Project filed. VIDED.
	Oct 25 2000	Brief amicus curiae of Dow Jones & Company, Inc. filed. VIDED.
	Oct 25 2000	Brief amicus curiae of Media Entities and Organizations filed. VIDED.
	Oct 25 2000	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
	Nov 2 2000	CIRCULATED.
	Nov 3 2000	Motion of the Solicitor General for divided argument filed.
	Nov 3 2000	Motion of respondents for divided argument filed.
	Nov 9 2000	Motion of United States for divided argument

App

No. 99-1728-CFX

Entry	Date	Proceedings and Orders
		DISTRIBUTED.
	Nov 9 2000	Motion of respondents for divided argument DISTRIBUTED.
	Nov 13 2000	Motion of the Solicitor General for divided argument GRANTED.
	Nov 13 2000	Motion of respondents for divided argument GRANTED.
	Nov 22 2000	Reply brief of petitioners Gloria Bartnicki and Anthony F. Kane, Jr. filed. VIDED.
	Nov 27 2000	Reply brief of petitioner United States filed. VIDED.
	Dec 5 2000	ARGUED.

Supreme Court, U.S.
FILED
APR 27 2000
OFFICE OF THE CLERK

No. 99-1728

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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118 pp

QUESTION PRESENTED

Whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner United States of America appeared as an intervenor of right in the court of appeals pursuant to 28 U.S.C. 2403(a). Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; Lackazerne, Inc., d/b/a WGBI Radio; and Jack Yocum were defendants in the district court and appellants in the court of appeals. Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., were plaintiffs in the district court and appellees in the court of appeals.

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FREDERICK W. VOPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-58a) is reported at 200 F.3d 109. The opinions and orders of the district court (App., *infra*, 59a-68a, 69a, 70a-74a, 75a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1999. The petitions for rehearing were denied on February 25, 2000 (App., *infra*, 82a-83a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and the relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*, are set forth in the Appendix at App., *infra*, 84a-91a.

STATEMENT

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.* (Title III), is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972), and is designed to "protect effectively the privacy of wire and oral communications." Pub. L. No. 90-351, Tit. III, § 801(b), 82 Stat. 211 (Congressional findings). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) (1968 Senate Report); *Gelbard*, 408 U.S. at 48.

a. Consistent with that goal, Title III broadly prohibits the interception of wire, oral, and electronic communications except where authorized under Title III itself. 18 U.S.C. 2511(1)(a). It also sets forth the procedures that must be employed, and the substantive criteria that must be met, before a wiretap or other form of electronic surveillance may be authorized under Title III. 18 U.S.C. 2516, 2518 (1994 & Supp. IV 1998). See also 18 U.S.C. 2511(2).

As enacted in 1968, Title III applied only to wire and oral communications. See Tit. III, § 802, 82 Stat. 212. In 1986, however, Congress amended Title III to cover the electronic transmission of non-voice data such as electronic mail and other Internet communications, see 18 U.S.C. 2510(12) (1994 & Supp. IV 1998), and to clarify that Title III extends to communications on cellular and other wireless telephone systems, see 18 U.S.C. 2510(1). See also Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848; S. Rep. No. 541, 99th Cong., 2d Sess. 1-3, 7-8, 11 (1986).[1]

b. Because the interception of communications is generally a surreptitious and difficult-to-detect enterprise, the fact or source of such an invasion "[a]ll too often * * * will go unknown." 1968 Senate Report 69; see also *id.* at 96 ("[U]nlawful electronic surveillance is typically a clandestine crime."). In part for that reason, Congress determined that merely prohibiting unauthorized surveillance itself would not be sufficient. *Id.* at 69. Instead, Congress concluded that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Ibid.*

Accordingly, Congress accompanied the prohibition on unauthorized interceptions with restrictions on the use of the fruits of such invasions. 1968 Senate Report 69. See, *e.g.*, 18 U.S.C. 2515 (unlawfully intercepted communications inadmissible as evidence). Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that it "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." Section 2511(1)(d)

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[1] Before the 1986 amendments, it was unsettled whether Title III's definition of "wire communication" reached the radio portion of cellular telephone communications. See, *e.g.*, *Edwards* v. *State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987). ECPA makes it clear that Congress intended to bring cellular phone communications within the ambit of Title III. *Shubert* v. *Metrophone, Inc.*, 898 F.2d 401, 404-405 (3d Cir. 1990).

makes it unlawful for any person with the same knowledge or reason to know to "intentionally use[], or endeavor[] to use, the contents of any wire, oral, or electronic communication." Title III thus proscribes *all* unauthorized uses of the contents of illegally intercepted communications, including but not limited to their disclosure, by persons knowing or having reason to know of their unlawful source.

Violations of Title III may be prosecuted as criminal offenses or result in the imposition of civil fines. 18 U.S.C. 2511(4) and (5). Title III also provides a private cause of action for any person whose communication is intercepted, disclosed, or used in violation of the statute. 18 U.S.C. 2520(a). In a civil action under Title III, a court may award such "relief as may be appropriate," including declaratory and injunctive relief, compensatory damages or prescribed statutory damages, and punitive damages "in appropriate cases." 18 U.S.C. 2520(b) and (c).

2. This case arises out of the illegal interception of a private telephone conversation between Gloria Bartnicki, the chief negotiator for a Pennsylvania teachers union, and Anthony Kane, the union's president. The union was engaged in contract negotiations with a local school board, and Bartnicki and Kane held a confidential telephone conversation in which they discussed the status of the negotiations. Bartnicki used a cellular telephone. App., *infra*, 3a.

An unknown person illegally intercepted the conversation, recorded it, and anonymously delivered a copy of the recording to respondent Jack Yocum. Yocum was president of a local taxpayers association formed for the purpose of opposing the union's bargaining demands. App., *infra*, 3a. Yocum listened to the recording, which contained inflammatory remarks regarding the school

board, and recognized the voices of Bartnicki and Kane. *Ibid.* He then gave the recording to respondent Frederick Vopper, the host of a local radio talk show. *Id.* at 3a-4a. Apparently, respondent Vopper retained the tape for over a month, *id.* at 55a-56a n.6 (Pollak, J., dissenting), but eventually played it on his program repeatedly, *id.* at 4a. That program was broadcast by two local radio stations, respondent station WILK and respondent station WGBI. *Ibid.*

Bartnicki and Kane brought a civil action in the United States District Court for the Middle District of Pennsylvania against respondents Yocum and Vopper, as well as the respondent radio stations, under Title III, 18 U.S.C. 2520, and a parallel provision of Pennsylvania law, 18 Pa. Cons. Stat. Ann. §§ 5701 *et seq.* (West 1983). Bartnicki and Kane asserted that respondents had disclosed and used the taped conversation, knowing or having reason to know that it was intercepted unlawfully, in violation of 18 U.S.C. 2511(1)(c) and (d), and in violation of corresponding provisions of Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 5725 (West 1983 & Supp. 1999).

Respondents sought summary judgment, arguing that application of Title III (and the Pennsylvania electronic eavesdropping statute) to their actions would violate the First Amendment. They asserted that, where a private conversation is illegally intercepted or recorded through electronic eavesdropping devices, third parties have a constitutional right to disclose the contents of that conversation *if* they were not responsible for the initial interception and the conversation is deemed to involve matters of public significance. App., *infra*, 65a; see also *id.* at 74a. According to respondents, statutes that, like Title III, impose liability for such disclosures are subject to strict scrutiny and are

invalid under the First Amendment as applied here. *Id.* at 65a.

The district court denied the motion, holding, *inter alia*, that the application of Title III to respondents does not violate the First Amendment. App., *infra*, 65a-67a, 74a. The district court later certified the First Amendment issue for interlocutory appeal under 28 U.S.C. 1292(b), App., *infra*, 75a-76a, and respondents filed a petition for interlocutory review, *id.* at 5a.

3. Following oral argument on respondents' interlocutory appeal, the court of appeals notified the Attorney General that the constitutionality of the application of 18 U.S.C. 2511(1)(c) and (d) to the facts of this case was at issue and invited the United States to present its views. App., *infra*, 77a-79a; see 28 U.S.C. 2403(a).[2] The United States intervened and filed a brief to defend those provisions. App., *infra*, 5a.

A divided panel of the court of appeals reversed. App., *infra*, 1a-58a. The court stated: "At issue is whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants * * * played no direct or indirect role in the interception." *Id.* at 2a. The court of appeals agreed with the United States that 18 U.S.C. 2511(1)(c) and (d), and the corresponding provisions of Pennsylvania law, are subject to intermediate rather than strict

[2] Under 28 U.S.C. 2403(a), federal courts are required to notify the Attorney General when the constitutionality of an Act of Congress is drawn into question in a federal suit to which the United States is not a party; and they are required to permit the United States to intervene "with all the rights of a party" to defend the constitutionality of the statute.

scrutiny. App., *infra*, 17a-28a.[3] The court explained that, to the extent those provisions are designed to reinforce the underlying prohibition on unauthorized interceptions, they "are properly treated as content neutral." *Id.* at 28a. The court, concluded, however, that those provisions do not satisfy intermediate scrutiny when applied to "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged th[e] interception." *Id.* at 42a.

The court of appeals rejected the government's contention that Title III's bar on the use and dissemination of illegally intercepted conversations is necessary to diminish the demand for such materials. App., *infra*, 33a-36a. "The connection between prohibiting third parties from using or disclosing" such communications and "preventing the initial interception," the court of appeals stated, was too "indirect." *Id.* at 33a. The government's interest in protecting privacy and ensuring public confidence, the court of appeals found, "can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* at 35a. Finally, the court expressed concern that the media might be deterred from publishing material not obtained in violation of Title III by the possibility of liability where the information's origin is unclear. *Id.* at 36a.

[3] The court of appeals rejected respondents' claim that *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), require the application of strict scrutiny. Those cases, the court held, expressly decline to address the constitutionality of laws that, like Title III, proscribe the dissemination of a communication that "has been acquired *unlawfully* by a newspaper or [by] a source." App., *infra*, 13a (quoting *Florida Star*, 491 U.S. at 535 n.8).

Judge Pollak (Senior D.J., sitting by designation) dissented. App., *infra*, 42a-58a. Judge Pollak agreed with the majority's conclusion that intermediate scrutiny is appropriate, but he "part[ed] company" with the majority on the proper application of that standard to Title III. *Id.* at 47a (Pollak, J., dissenting). He explained: "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an unlawful interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping." *Id.* at 50a-51a (quoting *Boehner* v. *McDermott*, 191 F.3d 463, 470 (D.C. Cir. 1999)). Judge Pollak concluded that the "First Amendment values on which [respondents] take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable—indeed kindred—dimension." App., *infra*, 58a.

The United States and the plaintiffs filed petitions for rehearing en banc. The court denied rehearing en banc by a 6-5 vote; Judges Greenberg, Scirica, Nygaard, Alito, and Rendell would have granted rehearing en banc. App., *infra*, 82a-83a.

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated, as contrary to the First Amendment, a significant application of Title III's "comprehensive scheme," *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972), for protecting the privacy of, and ensuring public confidence in the facilities used for, wire, oral, and electronic communications. Under 18 U.S.C. 2511(1)(c) and (d), it is unlawful for any person to use or disclose the contents of a communication intercepted in violation of Title III, if that person

knows or has reason to know that the communication was intercepted unlawfully. The court of appeals held those provisions unconstitutional as applied to anyone who did not participate in or encourage the initial illegal interception if the intercepted communication relates to a matter of public significance. App., *infra*, 37a, 42a.

That conclusion is wrong. It is also inconsistent with the decision in *Boehner* v. *McDermott*, 191 F.3d 463 (D.C. Cir. 1999), which rejected an almost indistinguishable constitutional challenge. The Third Circuit's decision here, moreover, calls into question the constitutionality of numerous state statutes that contain prohibitions like those contained in Title III. And it undermines the comprehensive scheme Congress established to ensure public confidence in the security of private conversations. This Court's review is therefore warranted.[4]

1. The fundamental purpose of Title III is to protect the privacy of wire, oral, and electronic communications. Title III's restriction on the use of illegally intercepted communications, contained in 18 U.S.C. 2511(1)(c) and (d), furthers that legislative goal in at least two ways. First, it reinforces Title III's underlying prohibition on electronic surveillance, 18 U.S.C. 2511(1)(a). Because no one can lawfully disclose or otherwise use a communication he knows to be the product of illegal wiretapping, there can be no "market" for illegally intercepted communications. Title III thus

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[4] The plaintiffs below have filed a petition for a writ of certiorari seeking review of the judgment of the court of appeals. *Bartnicki* v. *Vopper*, No. 99-1687 (filed Apr. 19, 2000). The defendant in *Boehner* v. *McDermott* has filed a petition for a writ of certiorari seeking review of the District of Columbia Circuit's decision in that case. See *McDermott* v. *Boehner*, No. 99-1709 (filed Apr. 25, 2000).

reduces the incentive to engage in unlawful wiretapping (and other prohibited forms of electronic surveillance) in the first instance. See *Boehner*, 191 F.3d at 469-470; *Fultz* v. *Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991) (18 U.S.C. 2511(1)(c) and (d) "strengthen[s] [Section 2511(1)(a)] by denying the wrongdoer the fruits of his conduct").

Second, when illegal surveillance does take place, the challenged provisions protect against the additional injury that occurs when the contents of intercepted communications are exploited by third parties. As this Court has observed, an "invasion of privacy is [not] over and done with" when a communication is intercepted, but instead is compounded when the communication is disclosed or otherwise used without the permission of the parties to the conversation. *Gelbard*, 408 U.S. at 51-52.

The use-and-disclosure prohibitions of Title III thus offer members of the public the assurance that they can speak freely with one another through private means —whether by telephone or in person in the privacy of their homes—without having their confidential conversations disclosed or otherwise exploited by unknown persons. The provisions thus further the fundamental interest in "the free exchange of ideas enshrined in the First Amendment." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 686 (1989).

a. As the Third Circuit here and the District of Columbia Circuit in *Boehner*, *supra*, both recognized, when Title III's restrictions are applied to the disclosure of illegally intercepted communications by persons other than the individuals who intercepted them, they are subject to intermediate rather than strict scrutiny under the First Amendment. App., *infra*, 28a; *Boehner*, 191 F.3d at 467. Two features of Section

2511(1)(c) and (d) support that conclusion. First, Title III does not single out speech or other expressive activities, but rather establishes a general prohibition on the use of illegally intercepted communications; that prohibition includes, but is not confined to, expressive uses like disclosure. *Boehner*, 191 F.3d at 467-468. See *United States* v. *O'Brien*, 391 U.S. 367 (1968).[5] Second, Title III is content-neutral. It does not predicate liability on "the[] content" of the intercepted communications, "but instead [on] the *process* by which they are collected." *Lam Lek Chong* v. *United States DEA*, 929 F.2d 729, 733 (D.C. Cir. 1991) (emphasis added). Where a communication is acquired through illegal electronic surveillance, Title III bars disclosure and other uses, regardless of subject matter or viewpoint.

Title III's use prohibitions thus are not the product of the government's "agreement or disagreement with the message" conveyed. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642-643 (1994) (brackets omitted). Nor do they reflect a legislative desire to conceal from the public information on particular subjects. Instead, because Title III contains "generally applicable, content neutral prohibitions on conduct that create incidental burdens on speech," *Boehner*, 191 F.3d at 467, it falls squarely within the ambit of this Court's intermediate

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[5] Title III's ban on the use of illegally intercepted communications thus applies with equal force whether the defendant uses the communication for wholly non-expressive purposes, 18 U.S.C. 2511(1)(d), such as trading stocks or developing a new product, see, *e.g.*, 1968 Senate Report 69 (use of intercepted communications regarding trade secrets or corporate and labor-management transactions); *Fultz*, 942 F.2d at 400 n.4 (extortion); *Dorris* v. *Absher*, 959 F. Supp. 813, 815-817 (M.D. Tenn. 1997) (workplace discipline), or instead uses it for expressive purposes such as publication, 18 U.S.C. 2511(1)(c).

scrutiny precedents. See *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) ("If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien*," but "[i]f the government interest is related to the content of the expression, * * * then the regulation falls outside the scope of the *O'Brien* test."); *Turner*, 512 U.S. at 661 (provisions subject to intermediate scrutiny where they "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny").

Under the intermediate scrutiny framework of *O'Brien*, a statute's application is constitutional if the statute "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377; *Turner*, 512 U.S. at 662. Title III meets that test.[6] Its underlying goal of protecting and maintaining the confidentiality of wire, oral, and electronic communications is manifestly legitimate and substantial, and unrelated to "the suppression of free expression." See *Boehner*, 191 F.3d at 468. By barring the use of unlawfully intercepted communications, Section 2511(1)(c) and (d) reinforces Title III's prohibition on illicit surveillance and protects against the additional injury that arises when illegally intercepted information is put to unauthorized uses. 191 F.3d at 468-469. The statute thereby promotes free

[6] Even if strict scrutiny were applicable, Title III's prohibitions would pass constitutional muster.

expression by assuring individuals that the law will protect the confidentiality of their private conversations. In addition, Title III's use restrictions are not unnecessarily broad. They apply only to those who know or have reason to know of the unlawful source. And only by comprehensively prohibiting such uses of illegally intercepted communications can the interests served by Title III be vindicated. 191 F.3d at 470; p. 3, *supra* (legislative findings).

b. The Third Circuit's rationale for concluding that Section 2511(1)(c) and (d) fails intermediate scrutiny is unsound. That court believed that the proposition that Title III's use-and-disclosure restrictions deter unlawful interceptions, by curtailing the incentive to conduct them in the first instance, is an "ipse dixit" that rests on "little more than assertion and conjecture." App., *infra*, 33a-34a. But the same logic has long been accepted as a justification for statutes that prohibit the knowing possession and sale of stolen property. See, *e.g.*, *United States* v. *Gardner*, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861 (1975); *United States* v. *Bolin*, 423 F.2d 834, 838 (9th Cir.), cert. denied, 398 U.S. 954 (1970). This Court itself relied on a similar rationale in *New York* v. *Ferber*, 458 U.S. 747, 760 (1982), where it held that "[t]he most expeditious if not the only practical method" of effectuating a ban on the production of child pornography "may be to dry up the market for this material" by imposing sanctions on possession, advertising, and distribution.[7] The court of appeals also

[7] Given the immediate connection between the use-and-disclosure restrictions and their effect on incentives to conduct illegal interceptions, and this Court's recognition of similiar connections in cases such as *Ferber* and *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990), the government does not need to provide evidentiary "proof" for the obvious proposition that more surveillance will take

erred in failing to take into account the function of the use-and-disclosure ban in preventing aggravation of the initial invasion of privacy. See *Gelbard*, 408 U.S. at 51-52. The court apparently discounted that purpose because of its view that preventing "the injury associated with the disclosure of private facts" is an interest that would make the provisions at issue "subject to strict scrutiny as a content-based regulation." App., *infra*, 27a. But the use-or-disclosure ban protects the privacy of communications based on the means by which they were unlawfully acquired; it contains no content criteria at all.

The court of appeals likewise erred in its suggestion that the objectives of the statute "can be reached by enforcement of existing provisions against the responsible parties," *i.e.*, by punishing only the persons who engage in illegal wiretapping and electronic surveillance. App., *infra*, 35a. That is not a practicable option. By its very nature, electronic surveillance is a surreptitious enterprise. One who employs unlawful wiretaps can effectively insulate himself from liability by conveying the intercepted communication to third parties anonymously. As the District of Columbia Circuit has pointed out, criminals who bug residences, intercept and record private phone calls, and engage in other forms of unlawful electronic surveillance "can literally launder illegally intercepted information." *Boehner*, 191 F.3d at 471. In this very case neither the private plaintiffs nor the United States can enforce Title III

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place if eavesdroppers enjoy an unrestricted market for the fruits of their labors. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 906 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

against the party responsible for the illegal interception because that party is unknown. "[E]nforcement of existing provisions against the responsible parties," App., *infra*, 35a, is therefore insufficient to deter illegal surveillance. Instead, as Congress recognized when it enacted Title III, "[o]nly by striking at all aspects of the problem can privacy be adequately protected." 1968 Senate Report 69. Accord *Boehner*, 191 F.3d at 471 (invalidation of Section 2511(1)(c) would "render the government powerless to prevent disclosure of private information" because criminals can both intercept and disclose communications anonymously).

The court of appeals expressed concern that the threat of liability under Title III might deter the news media from disseminating the contents of communications that were *not* illegally intercepted. App., *infra*, 36a-37a. In light of Title III's scienter requirements, however, that "chilling" concern is overstated. Liability attaches under 18 U.S.C. 2511(1)(c) and (d) only when a defendant "know[s] or ha[s] reason to know" that the communication was intercepted in violation of Title III. Thus, the recipient who knows or ignores evidence that the proffered information was obtained unlawfully may face liability; but the party without such knowledge or reason to know does not—even if the communication in fact was illegally intercepted.[8]

2. The Third Circuit's decision in this case is inconsistent with the District of Columbia Circuit's recent

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[8] To the extent there may be remaining concerns about the potential chilling effect of the statute, those concerns can be addressed by, for example, requiring clear and convincing proof in a civil case and providing for de novo appellate review—approaches applied in other First Amendment settings. See App., *infra*, 56a-57a (Pollak, J., dissenting); see generally *Waters* v. *Churchill*, 511 U.S. 661, 669-671 (1994) (plurality opinion).

decision in *Boehner*, *supra*, which rejected a virtually identical First Amendment challenge to the constitutionality of 18 U.S.C. 2511(1)(c) and a parallel Florida statute. In *Boehner*, the District of Columbia Circuit, like the Third Circuit in this case, subjected Section 2511(1)(c) to intermediate scrutiny. 191 F.3d at 466-467. But, unlike the Third Circuit, the District of Columbia Circuit concluded that Section 2511(1)(c) could constitutionally be applied to the non-media defendant in that case, who had disclosed the contents of intercepted conversations concerning matters of public interest, even though he did not participate in the initial interception. See 191 F.3d at 467-470. See also *id.* at 480 (Ginsburg, J., concurring) ("I agree that the statute passes [intermediate scrutiny] for the reasons given in the opinion for the Court.").

The court of appeals in this case attempted to distinguish *Boehner*, pointing out that *Boehner* did not involve media defendants, whereas this case does. App., *infra*, 40a; 191 F.3d at 407, 477-478 (reserving the issue of media liability). That difference does not distinguish *Boehner*, however. As the Third Circuit acknowledged, respondent Yocum in this case is not a media defendant. To the contrary, he "technically * * * stands in the same position as" the defendant in *Boehner*, *i.e.*, as a non-press defendant who served "as the source but not the interceptor." App., *infra*, 40a. See also *id.* at 46a n.3 (Pollak, J., dissenting) (respondent Yocum's role "seems analogous to that of" the *Boehner* defendant); *id.* at 37a n.7 (Pollak, J., dissenting) (presence of media respondents in this case does not enhance non-media respondent Yocum's rights). In any event, the court in *Boehner* stated that "the press has no greater First Amendment rights than

anyone else." 191 F.3d at 477 n.20; accord, *id.* at 483 (Sentelle, J. dissenting).

The Third Circuit also suggested that respondent Yokum was not similarly situated to the individual defendant in *Boehner* because that defendant (Representative James McDermott) may have been "more than an innocent conduit" at the time he received the illegally recorded tape from those who conducted the interception. App., *infra*, 40a. But neither individual defendant (Yokum or McDermott) was alleged to have had "participated in or encouraged that [unlawful] interception"—the Third Circuit's own criteria for removing First Amendment protection (*id.* at 42a)—and both defendants were alleged to have had knowledge or reason to know of the illegal interception at the time of the challenged use or disclosure. There is thus no sound basis in the facts of the two cases to justify their divergent outcomes. Where, as here, courts of appeals have reached different conclusions regarding the constitutionality of the application of an Act of Congress to materially indistinguishable facts, this Court's intervention is warranted.

3. The court of appeals' decision addresses an important and unresolved issue of constitutional law. This Court has never squarely decided "whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (emphasis added); *Boehner*, 191 F.3d at 472-473 (Randolph, J.) (explaining that the Court's cases "do not 'settle'" the issue); App., *infra*, 13a-14a (similar). In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979), this Court did state that the application of statutes to punish the disclosure of "law-

fully obtained," truthful information of public significance generally must be justified by a state interest of the highest order. But in *Florida Star*, this Court clarified that Congress and the States may, to protect the privacy of confidential information held by private parties, "under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Florida Star*, 491 U.S. at 534. The challenged provisions of Title III do precisely that, *i.e.*, they regulate the use of *unlawfully* intercepted communications.

Where this Court has invalidated statutes barring the publication of truthful information, the statutes not only extended to information that was "lawfully obtained" in the first instance, but also targeted speech, on the basis of its subject matter, in order to foreclose public knowledge of a particular type of information. See, *e.g.*, *Florida Star*, 491 U.S. at 534 (prohibition on publication of the names of victims of sexual assault); *Daily Mail*, 443 U.S. at 99 (identity of juvenile charged as an offender in West Virginia courts). And those cases involved information that either came from the government itself, *Florida Star*, 491 U.S. at 534 (information provided by police), or concerned governmental proceedings, *Daily Mail*, 443 U.S. at 99 (charging of juvenile in West Virginia courts). See also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838-839 (1978) (publication bar with respect to judicial discipline proceedings). Title III, in contrast, is limited to the contents of communications that were illegally obtained; it prohibits all uses of such communications, rather than singling out expression or publication; it does not predicate liability on content or subject matter; it does not seek to suppress public knowledge

about particular issues or subjects; and it is not aimed at information from or concerning the government. This Court should determine whether such a statute is constitutional.

The constitutionality of Title III and statutes like it is a matter of considerable import. Forty-four States and the District of Columbia have laws that, like Title III and the Pennsylvania statute at issue here, bar "not only the interception of electronic communications, but also the disclosure of those communications by persons acting under color of law." *Boehner*, 191 F.3d 468 n.6; see App., *infra*, 53a & n. 5 (Pollak, J., dissenting) (noting numerous statutes that "closely parallel the provisions of" Title III, and declaring that "in the two centuries of our constitutional history there cannot have been more than a handful of decisions * * * which, in the exercise of the awesome power of judicial review, have cut so wide a swath"). Similar First Amendment challenges are being pursued in at least two other pending cases: *Peavy* v. *WFAA TV, Inc.*, No. 99-10272 (5th Cir. argued Apr. 3, 2000), and *Quigley* v. *Rosenthal*, No. 94-N-2782 (D. Colo.). And the volume of communications affected by those statutes and the Third Circuit's decision is rapidly increasing. As the technologies for carrying private communications proliferate and their usage increases, so too have the means that can be used to intercept them.[9]

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[9] Electronic mail over the Internet and wireless telephone usage have both experienced exponential growth in recent years. Because cellular handsets send and receive encoded radio signals that can be intercepted and deciphered "by regular radio scanners modified to intercept cellular calls," calls made on such handsets are easier to intercept than those made on traditional, wireline telephones. *Shubert* v. *Metrophone, Inc.*, 898 F.2d 401, 405 (3d Cir. 1990). Electronic mail transmitted over the Internet is likewise

The Third Circuit's decision decreases the security of such means of communications. Under that decision, individuals must communicate at the risk that, if their conversation is unlawfully intercepted, anyone other than the wiretapper himself is free to disclose the contents of the conversation to the world. Without assurances that the law will effectively protect the confidentiality of their conversations, members of the public may be less willing to take advantage of the means of communication that are increasingly at their disposal.

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subject to unlawful interception by surreptitious means. See, *e.g.*, "Security of the Internet," 15 *Encyclopedia of Telecommunications* 231, 236, 242 (Fritz E. Froehlich & Allen Kent eds. 1998); CERT Coordination Center, Software Engineering Institute, Carnegie Mellon University, *Report to the President's Commission on Critical Infrastructure Protection* § 3.1.3 (Jan. 1997) ("Information (such as electronic mail * * * and other data) is sent from one computer to another [on the Internet] in a form easily readable by anyone connected to a part of the network joining the two systems together.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 98-7156

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS; KEYMARKET OF NEPA, INC., D/B/A WILK RADIO; LACKAZERNE INC., D/B/A WGBI RADIO; JANE DOE; JOHN DOE; JACK YOCUM

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS; KEYMARKET OF NEPA, INC., D/B/A WILK RADIO; LACKAZERNE, INC., D/B/A WGBI RADIO; JACK YOCUM, APPELLANTS,

UNITED STATES OF AMERICA, INTERVENOR.

[Argued: Oct. 5, 1998.
Decided: Dec. 27, 1999]

Before: SLOVITER and COWEN, Circuit Judges, and POLLAK,* District Judge

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* Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

At issue is whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

I.

BACKGROUND

A.

From the beginning of 1992 until the beginning of 1994, Wyoming Valley West School District was in contract negotiations with the Wyoming Valley West School District Teachers' Union (the "Teachers' Union") over the terms of the teachers' new contract. The negotiations, which were markedly contentious, generated significant public interest and were frequently covered by the news media.

Plaintiffs Gloria Bartnicki and Anthony F. Kane, Jr., as well as defendant Jack Yocum, all were heavily involved in the negotiating process. Bartnicki was the chief negotiator on behalf of the Teachers' Union. Kane, a teacher at Wyoming Valley West High School, served as president of the local union. Yocum served as president of the Wyoming Valley West Taxpayers' Association, an organization formed by local citizens for the sole purpose of opposing the Teachers' Union's proposals.

In May of 1993, Bartnicki, using her cellular phone, had a conversation with Kane. They discussed whether the teachers would obtain a three-percent raise, as suggested by the Wyoming Valley West School Board, or a six-percent raise, as suggested by the Teachers' Union. In the course of their phone conversation, Kane stated:

> If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, 'we'll meet and discuss this.' You don't discuss the items in public.

App. at 35-36. Bartnicki responded, "No," and, Kane continued, "You don't discuss this in public . . . . Particularly with the press." App. at 36.

This conversation, including the statements quoted above, was intercepted and recorded by an unknown person, and the tape left in Yocum's mailbox. Yocum retrieved the tape, listened to it, and recognized the voices of Bartnicki and Kane. He then gave a copy of

the tape to Fred Williams, also known as Frederick W. Vopper, of WILK Radio and Rob Neyhard of WARM Radio, both local radio stations. Williams repeatedly played part of the tape on the air as part of the Fred Williams Show, a radio news/public affairs talk show which is broadcast simultaneously over WILK Radio and WGBI-AM. The tape was also aired on some local television stations and written transcripts were published in some newspapers.

B.

Bartnicki and Kane sued Yocum, Williams, WILK Radio, and WGBI Radio (hereafter "media defendants") under both federal and state law. They based their federal claims on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 28 U.S.C. § 2510 *et seq.*, and their state claims on the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5701 *et seq.* As relief, Bartnicki and Kane sought (1) actual damages in excess of $50,000, (2) statutory damages under 18 U.S.C. § 2520(c)(2), (3) liquidated damages under 18 Pa. Cons. Stat. § 5725(a)(1), (4) punitive damages, and (5) attorneys' fees and costs.

Bartnicki, Kane, and the defendants each moved for summary judgment. The District Court denied these motions on June 14, 1996 and denied defendants' motion to reconsider on November 8, 1996, specifically holding that imposing liability on the defendants would not violate the First Amendment.

The District Court subsequently certified two questions as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant Fred Williams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping statutes] on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." App. at 388. Williams, WILK Radio, and WGBI Radio subsequently petitioned for permission to appeal. Yocum filed an answer to the petition in which he joined the media defendants' request that we hear this appeal. We granted the petition by order dated February 26, 1998. The Pennsylvania State Education Association submitted a brief as *amicus curiae* in support of the appellees, and the United States has intervened as of right pursuant to 28 U.S.C. § 2403.

C.

The District Court had jurisdiction to consider claims based on the Omnibus Crime Control and Safe Streets Act of 1968 pursuant to 28 U.S.C. § 1331. It had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to consider claims based on the Pennsylvania Wiretapping and Electronic Surveillance Control Act. We have appellate jurisdiction to review the District Court's substantive determination pursuant to 28 U.S.C. § 1292(b).

The scope of our review in a permitted interlocutory appeal is limited to questions of law raised by the underlying order. We are not limited to answering the questions certified, however, and may address any issue necessary to decide the appeal. *See Dailey v. National Hockey League*, 987 F.2d 172, 175 (3d Cir. 1993).

We review the grant or denial of a motion for summary judgment de novo. *See H.K. Porter Co. v. Pennsylvania Ins. Guaranty Ass'n*, 75 F.3d 137, 140 (3d Cir. 1996). We are "required to apply the same test the district court should have utilized initially," to view inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, and to take the non-movant's allegations as true whenever these allegations conflict with those of the movant. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976).

D.

The Federal Omnibus Crime Control and Safe Streets Act of 1968 (the "Federal Wiretapping Act") provides in relevant part:

(1) Except as otherwise specifically provided in this chapter any person who—

. . . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511. It continues:

(a) **In general.**—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in the violation such relief as may be appropriate.

18 U.S.C. § 2520. The Federal Wiretapping Act thus creates civil and criminal causes of action against those who intentionally use or disclose to another the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained in violation of the statute.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (the "Pennsylvania Wiretapping Act") is similar. It provides:

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

. . . . .

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication.

18 Pa. Cons. Stat. § 5703. It further provides:

(a) Cause of action.—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication . . . .

18 Pa. Cons. Stat. § 5725. The Pennsylvania Wiretapping Act thus also creates civil and criminal causes of action based on the knowing or negligent use or disclosure of illegally intercepted material. We refer to the federal and state statutes at issue here as "The Wiretapping Acts."

Both Acts also explicitly authorize the recovery of civil relief. The Federal Wiretapping Act provides that a court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. § 2520(c)(2). The Pennsylvania Wiretapping Act specifies that a successful plaintiff shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

18 Pa. Cons. Stat. § 5725(a).

II.

DISCUSSION

A.

As the District Court acknowledged and the parties do not dispute, the media defendants neither intercepted nor taped the conversation between Bartnicki and Kane. Indeed, the record does not disclose how or by whom the conversation was intercepted. The media

defendants argued before the District Court that these facts preclude a court from finding them liable under the Wiretapping Acts. The District Court disagreed. It concluded that, "a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception." *Bartnicki v. Vopper*, No. 94-1201, slip op. at 5 (M.D. Pa. June 17, 1996). It further opined that such an interpretation of the statute "adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such." *Id.* The District Court concluded that genuine disputes of material fact remain regarding (1) whether the Bartnicki-Kane conversation was illegally intercepted, and if so (2) whether any or all of the defendants knew or had reason to know that that conversation was illegally intercepted. *See id.* at 5, 10. The parties do not challenge these holdings on appeal.

Hence, this case does not involve the prohibitions of the Wiretapping Acts against the actual *interception* of wire communications. Nor does it involve any application of the Acts' criminal provisions. Rather, this case focuses exclusively on the portions of the Wiretapping Acts that create causes of action for civil damages against those who use or disclose intercepted communications and who had reason to know that the information was received through an illegal interception.

The defendants argue that applying the damages provision of the Wiretapping Acts to hold them liable for disclosing the Bartnicki-Kane conversation violates the First Amendment. They contend that this case is

controlled by the Supreme Court's decisions in a series of cases addressing the tension between the First Amendment and the right to privacy.

In the first of these cases, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed.2d 328 (1975), the Court considered a private right of action created by a Georgia statute making it a "misdemeanor to publish or broadcast the name or identity of a rape victim." *Id.* at 472, 95 S. Ct. 1029. The Court was asked to decide whether Georgia could impose civil liability on a television broadcasting company, among others, for accurately broadcasting the name of a deceased, 17-year-old rape victim where the reporter obtained the information from official court records open to public inspection.

In the next case, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978), the Court reviewed a Virginia statute that both provided for the confidentiality of judicial disciplinary proceedings and made it unlawful to divulge the identity of a judge subject to such proceedings prior to the filing of a formal complaint with the state's highest court. The Supreme Court was asked to decide whether Virginia could criminally prosecute a newspaper for publishing accurate information about such proceedings where the newspaper received the information from a participant in the proceedings who had the right to receive the information but not the right to divulge it. *See id.* at 830, 98 S. Ct. 1535.

Finally, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L.Ed.2d 399 (1979), the Court considered a West Virginia statute "making it a crime

for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender." *Id.* at 98, 99 S. Ct. 2667. The Court was asked to decide whether West Virginia could prosecute two newspapers for publishing the name of a 14-year-old student who was accused of shooting and killing a 15-year-old classmate at the local junior high school. The newspapers had obtained the student's name by interviewing witnesses at the school.

The Supreme Court concluded that each of these attempts to punish or deter the press's publication of truthful information was unconstitutional. The *Smith* Court, in summarizing the Court's past cases, read them as suggesting at least two propositions: (1) "state action to punish the publication of truthful information seldom can satisfy constitutional standards," and (2) "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 491 U.S. at 102, 103, 109 S. Ct. 2324; *accord Florida Star v. B.J.F.*, 491 U.S. 524, 533-37, 109 S. Ct. 2603, 105 L.Ed.2d 443 (1989) (adopting and explaining the justification for the second *Smith* proposition).

The defendants contend that the information disclosed about the Bartnicki-Kane conversation was lawfully obtained within the meaning of the *Smith* decision because the defendants in this case neither participated in the presumed interception nor violated any law by receiving the information. They conclude that the Wiretapping Acts may not be applied to hold

them liable without first meeting the test of strict scrutiny.

Bartnicki and Kane respond by arguing that the information at issue here was unlawfully obtained because the original interception presumably was illegal. They conclude that applying the Acts to hold the defendants liable is constitutional without subjecting those statutes to any level of First Amendment scrutiny. The parties thus assume that we should determine the constitutionality of the Wiretapping Acts by first determining whether the information disclosed was "lawfully" or "unlawfully" obtained.

Although we are cognizant of the importance of the *Cox*, *Landmark*, and *Smith* cases as background, we decline to read *Smith* as controlling here. The Supreme Court has explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny. In *Florida Star*, the Court stated, "The [*Smith*] principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n. 8, 109 S. Ct. 2603. Similarly, the *Smith* Court was careful to note that its holding did not reach the issue of unlawful press access. *See* 443 U.S. at 105, 99 S. Ct. 2667.

Moreover, the Supreme Court's practice of narrowly circumscribing its holdings in this area strongly suggests that a rule for undecided cases should not be

derived by negative implication from its reported decisions. The defendant in *Landmark* urged the Court to adopt a blanket rule, protecting the press from any liability for truthfully reporting information concerning public officials and their public duties, but the Supreme Court refused to do so. *See* 435 U.S. at 838, 98 S. Ct. 1535. Instead it considered the very narrow question: "whether [a state] may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes." *Id.* at 830, 98 S. Ct. 1535.

Similarly, the *Florida Star* Court refused "appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment." 491 U.S. at 532, 109 S. Ct. 2603. It stated: "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily . . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 532-33, 109 S. Ct. 2603.

In keeping with the Supreme Court's approach to deciding these illustrative cases, we will resolve the present controversy not by mechanically applying a test gleaned from *Cox* and its progeny, but by reviewing First Amendment principles in light of the unique facts and circumstances of this case.

B.

The District Court based its conclusion that the damages provision of the Wiretapping Acts may constitutionally be applied to penalize the defendants' conduct primarily on the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991). The District Court interpreted that decision as standing for the proposition that a generally applicable law that neither singles out the press for special burdens nor purposefully restricts free expression does not offend the First Amendment. *See Bartnicki*, slip op. at 8 ("Generally applicable laws 'do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.'" (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991))). The District Court emphasized language from the *Cohen* opinion in which the Supreme Court stated, "'[i]t is . . . beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *Bartnicki*, slip op. at 8 (quoting *Cohen*, 501 U.S. at 670, 111 S. Ct. 2513).

After reviewing the Federal and Pennsylvania Wiretapping Acts, the District Court found that neither Act targets or singles out the press. The District Court also opined that these laws are not "specifically designed to chill free speech." *Id.* at 7. Based on this finding, it concluded that "both acts are matters of general applicability" and, without further analysis,

denied defendants' motion for summary judgment on the basis of the First Amendment.

There is reason to question whether the damages provisions of the Acts are properly categorized as generally applicable laws. Arguably, that term should be reserved for laws that directly regulate conduct rather than speech. *See* infra at 119. Moreover, it may well be that be that [*sic*] by banning the disclosure of certain information, the damages provisions impose a disproportionate burden on the press. Indeed, we would not be surprised to find that a prohibition on disclosure falls more heavily on the press, which is in the business of disseminating information, than it does on ordinary citizens whose opportunities for spreading information are more limited.

We need not resolve that question, however, because we conclude that, by suggesting that generally applicable laws do not require First Amendment scrutiny when applied to the press, the District Court read the cited portions of *Cohen* too broadly. In *Cohen*, the plaintiff, who was actively associated with the election staff of a gubernatorial candidate, offered to provide two newspapers with some information concerning the candidate's opponent in exchange for a promise that the newspapers would not use his name in any resulting story. After having made the promise and secured the information, each newspaper proceeded to publish a story identifying Cohen as the source of the information and highlighting his role in the gubernatorial campaign. Cohen lost his job the day the stories ran. He then sued the publishers of the newspapers in state court and recovered damages under a theory of promissory estoppel. The publishers appealed, arguing that holding

them liable for their breached promises would violate the First Amendment.

It is in the context of rejecting this argument that the Supreme Court stated, "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669, 111 S. Ct. 2513. The Court explained that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670, 111 S. Ct. 2513.

The *Cohen* opinion thus instructs that a law of general applicability, which neither targets nor imposes disproportionate burdens upon the press, is enforceable against the press to the same extent that it is enforceable against individuals or organizations. The question remains whether the damages provisions of the Wiretapping Acts may constitutionally be applied to penalize individuals or organizations for disclosing material they know or have reason to know was illegally intercepted who had no part in the interception.

C.

In order to determine whether the provisions for civil sanctions from the Wiretapping Acts may constitutionally be applied to penalize defendants' disclosure, we must first decide what degree of First Amendment scrutiny should be applied.

The United States argues that the Federal Wiretapping Act is subject to intermediate rather than strict

scrutiny. It bases this contention on two subsidiary assertions: (1) that these are "general law[s] that impose[ ] only incidental burdens on expression" and (2) that "to the extent that Title III restricts speech in particular cases, it does so in an entirely content-neutral fashion." United States' Br. at 22. It states that "[a] statute satisfies intermediate scrutiny, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on speech is not unnecessarily great." United States' Br. at 11-12. We assume that the United States' arguments apply equally to the Pennsylvania Wiretapping Act, which is substantially similar to the Federal Wiretapping Act.

We first consider the United States' argument that the disclosure provisions of the Wiretapping Acts merit only intermediate scrutiny because they impose only incidental burdens on expression. In support, the United States cites a series of Supreme Court decisions, beginning with *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968).

O'Brien was arrested and convicted for burning his draft card on the steps of the South Boston Courthouse. On appeal, O'Brien argued that the federal law, making it an offense to "forge[ ], alter[ ], knowingly destroy[ ], knowingly mutilate[ ], or in any manner change[ ] . . . such [a] certificate," was unconstitutional. *Id.* at 370, 88 S. Ct. 1673 (italics omitted). The Court of Appeals for the First Circuit agreed that this provision unconstitutionally abridged the freedom of speech.

The Supreme Court, however, reversed. It opined that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." *Id.* at 375, 88 S. Ct. 1673.[1] The Supreme Court nonetheless recognized that O'Brien had burned his draft card as a form of protest against war. Assuming for the sake of argument that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Supreme Court held that the statute was still a permissible regulation. *Id.* at 376, 88 S. Ct. 1673. It reasoned that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* The Court stated that such "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest." *Id.* at 377, 88 S. Ct. 1673.

In *O'Brien* and its progeny, the Supreme Court distinguished between "expressive conduct protected to some extent by the First Amendment" and oral or

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[1] Respected commentators have taken issue with this holding in *O'Brien*. *See, e.g.*, Lawrence H. Tribe, *American Constitutional Law*, § 312-6 at 824-25 (2d ed. 1988).

written expression, which is fully protected by that amendment. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984). "[C]onduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative" is "[s]ymbolic expression," otherwise known as expressive conduct. *Id.* at 294, 104 S. Ct. 3065. The cases the United States cites in addition to O'Brien also focus on the permissibility of regulating expressive conduct. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L.Ed.2d 504 (1991) (Indiana statute prohibiting complete nudity in public places); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S. Ct. 3172, 92 L.Ed.2d 568 (1986) (New York statute authorizing closure of building found to be a public health nuisance); *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985) (federal statute making it unlawful to reenter a military base after having been barred by the commanding officer); *Clark*, 468 U.S. at 289, 104 S. Ct. 3065 (National Park Service regulation prohibiting camping in Lafayette Park); *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992) (Minnesota statute prohibiting display of certain objects, including a burning cross or Nazi swastika).

By citing this line of cases in support of its position that intermediate scrutiny applies here, the United States apparently suggests that defendants' actions in disclosing the contents of the Bartnicki-Kane conversation are properly considered "expressive conduct" rather than speech. If this is the thrust of the government's citations, it is not persuasive. The acts on which Bartnicki and Kane base their complaint are Yocum's "intentionally disclos[ing a] tape to several individuals

and media sources"[2] and the media defendants' "intentionally disclos[ing] and publish[ing] to the public the entire contents of the private telephone conversation between Bartnicki and Kane." App. at 149. If the acts of "disclosing" and "publishing" information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

We have no doubt that it is possible to identify some act by the media defendants in the course of preparing the broadcasts during which the tape was disclosed that falls within our ordinary understanding of the term conduct. However, this fact does not alter the analysis. The Supreme Court has observed, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such kernel is not sufficient to bring the activity within the protection of the First Amendment." *Barnes*, 501 U.S. at 570, 111 S. Ct. 2456 (quoting *Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989)). Similarly, although it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment.

The United States nonetheless insists that intermediate scrutiny is appropriate because the statute, read as

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[2] The complaint also alleges that Yocum "obtained a tape of the surreptitiously recorded telephone conversation," App. at 149, but the complaint does not allege that the mere obtaining of the tape violates either statute.

a whole, primarily prohibits conduct rather than speech. It notes that the prohibition in 18 U.S.C. § 2511(1)(d) against using or endeavoring to use intercepted material encompasses more than disclosure. The government asserts that it precludes, for example, a person or company from using intercepted material to develop a competing product, to craft a negotiating strategy, or to justify taking disciplinary action against an employee. United States' Br. at 22-23.

The government cites no support for the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone. We are convinced that this proposition does not accurately state First Amendment law. A statute that prohibited the "use" of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings, much as a law that directly prohibited the publication of those writings would surely violate that Amendment.

Because the defendants' acts in this case—the disclosure and broadcast of information—contain no significant "nonspeech" elements, we need not decide whether this statute could properly be subjected to lesser scrutiny if applied to prohibit "uses" that do involve such "nonspeech" elements. We merely hold that, when a statute that regulates both speech and conduct is applied to an act of pure speech, that statute must meet the same degree of First Amendment scrutiny as a statute that regulates speech alone.

The United States' second argument—that intermediate scrutiny applies because the Acts are content-neutral—is more persuasive.

When the state uses a "content-based" regulation to restrict free expression, particularly political speech, that regulation is subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir. 1997) (en banc). It will not be upheld unless the state can show that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321, 108 S. Ct. 1157; *see also Phillips*, 107 F.3d at 172 ("State regulations of speech that are not regarded as content neutral will be sustained only if they are shown to serve a compelling state interest in a manner which involves the least possible burden on expression.").

By contrast, when the state places a reasonable "content-neutral" restriction on speech, such as a time, place and manner regulation, that regulation need not meet the same high degree of scrutiny. "Content-neutral" restrictions are valid under the First Amendment provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information."[3] *Clark*, 468 U.S. at 293, 104 S. Ct. 3065.

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[3] This standard is little different from that announced in *O'Brien* as governing conduct regulations that incidentally restrict expressive behavior. *See Clark*, 468 U.S. at 298, 104 S. Ct. 3065.

We recognize that an argument could be made that the Wiretapping Acts are content-based. Ordinarily, the distinction between permissible and impermissible regulation of speech depends on whether the law at issue regulates the substantive content of the speech (what is said) or whether it merely regulates the time, place, or manner of the speech (when, where, at what volume, and through which medium it is said). The former regulations are content-based while the latter are content-neutral. The essence of the distinction lies in the fact that, if the regulation were content-based, it would not be possible to determine whether a particular speech is prohibited without referring to the substantive import of that expression.

The United States contends that the Wiretapping Acts are not content-based even in the literal sense referred to above because the Acts define the content that is prohibited by reference to the manner in which the information was acquired, rather than to its subject matter or viewpoint. We suspect that the mere fact that a regulation defines the category of content that is prohibited by reference to its source rather than its subject matter is unlikely to be sufficient to justify treating the regulation as content-neutral. For example, one might argue that a ban on the publication of information obtained through experimentation on human embryos would raise sufficient First Amendment concerns to merit heightened scrutiny, even if such experimentation were illegal.

The Supreme Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986), however, suggests that we are not limited to a literal interpretation of the phrase "content-neutral"

but may determine whether speech is content-neutral or content-based with reference to the government's proffered justification for the restriction. In *Renton*, the Supreme Court described "content-neutral" speech restrictions as those that "are justified without reference to the content of the regulated speech." *Id.* at 48, 106 S. Ct. 925 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976)). We therefore turn to consider the purpose or purposes the Wiretapping Acts are meant to serve.

The Senate Report describes the purposes of the Federal Wiretapping Act as: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153. Congress thus focused on privacy in adopting 18 U.S.C. § 2511, the provision that prohibits the interception of wire, oral, or electronic communications, as well as the use or disclosure of the contents of illegally intercepted communications. Congress did not, however, define the privacy interest that it intended the Act to protect.

As commonly understood, the right to privacy encompasses both the right "to be free from unreasonable intrusions upon [one's] seclusion" and the right to be free from "unreasonable publicity concerning [one's] private life." *Fultz v. Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991); *see also Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L.Ed.2d 64 (1977); *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999). The Sixth Circuit has opined that "[t]he prohibitions Congress incorporated

into section 2511(1) of Title III protect both these interests first, by prohibiting the surreptitious interception of private communications in the first instance—a highly offensive physical intrusion on the victim's private affairs—and second, by circumscribing the dissemination of private information so obtained." *Fultz*, 942 F.2d at 401 (footnote omitted). The First Circuit has similarly suggested that by enacting Title III Congress recognized "that the invasion of privacy is not over when the interception occurs but is compounded by disclosure." *Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979); *see also Fultz*, 942 F.2d at 402 ("Each time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated.").

We have no doubt that the state has a significant interest in protecting the latter privacy right—the right not to have intimate facts concerning one's life disclosed without one's consent. That right is a venerable one whose constitutional significance we have recognized in the past. *See Paul P.*, 170 F.3d at 401-02 (collecting cases). We also have no doubt that the prohibition on using or disclosing the contents of an illegally intercepted communication serves that interest by deterring the publicization of private facts.

We are less certain, however, that the desire to protect the privacy interest that inheres in private facts is a content-neutral justification for restricting speech. The Supreme Court has instructed that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S. Ct. 2395, 120 L.Ed.2d 101

(1992); *accord Lind v. Grimmer*, 30 F.3d 1115, 1117 (9th Cir. 1994) ("Because the[ ] concerns [addressed by the statute] all stem from the direct communicative impact of speech, we conclude that section 11-216(d) regulates speech on the basis of its content.") As Justice O'Connor explained in *Boos*, "[r]egulations that focus on the direct impact of speech on its audience"—the speech's "primary effects"—are not properly treated as content-neutral under *Renton*. 485 U.S. at 321, 108 S. Ct. 1157 (Opinion of O'Connor, J.).

Although the defendants do not argue that the regulations at issue are content-based, there is a not implausible argument that the injury associated with the disclosure of private facts stems from the communicative impact of speech that contains those facts, i.e. having others learn information about which one wishes they had remained ignorant. Thus, under the Supreme Court's jurisprudence, the injury associated with such disclosure constitutes a "primary effect" of the disfavored speech, rather than a "secondary effect." This reasoning might suggest that a statute that regulated expression for the purpose of protecting the right not to have private facts disclosed without permission would be subject to strict scrutiny as a content-based regulation.

We do not decide whether the Wiretapping Acts would indeed be properly categorized as content-based if justified on the basis of a need to prevent the disclosure of private facts because the United States for the most part eschews reliance on that justification in explaining the purpose of those acts. Instead, the United States argues that "the fundamental purpose of Title III is to maintain the confidentiality of wire,

electronic, and oral communications." United States' Br. at 33. It reasons that "prohibiting the use of illegally intercepted communication . . . 'strengthen[s] subsection (1)(a),' the provision that imposes the underlying ban on unauthorized interception, 'by denying the wrongdoer the fruits of his labor' and by eliminating the demand for those fruits by third parties." United States' Br. at 33. We are satisfied that this latter justification does not rely on the communicative impact of speech and, therefore, that the Acts are properly treated as content-neutral.

D.

Accordingly, we adopt the government's position that we should apply intermediate scrutiny in our analysis of the issue before us. In doing so, we must first fix upon an acceptable definition of the term "intermediate scrutiny."[4] Intermediate scrutiny is used by the Court in a wide variety of cases calling for some balancing. Thus, intermediate scrutiny has been applied to statutes that discriminate on the basis of gender. *See Craig v. Boren*, 429 U.S. 190, 200, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976) (holding that prohibiting sale of 3.2% beer to males under 21 and females under 18 did not "closely serve" goal of promoting traffic safety). It is the review standard used to examine whether an even-handed regulation promulgated for a legitimate

[4] In a recent article, the author uses the term "'intermediate scrutiny' to refer to a test that requires a state interest which is greater than legitimate but less than compelling and a fit between means and end that is not necessarily narrowly tailored but has more than just an incidental connection." Jay D. Wexler, Defending the Middle Way: *Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L.Rev. 298, 300 n. 15 (1998).

public interest violates the dormant Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970) (describing balancing test for state regulation); *Southern Pac. Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 65 S. Ct. 1515, 89 L.Ed. 1915 (1945) (invalidating limit on train length as not "plainly essential" to further state interest in safety). And in the First Amendment context, intermediate scrutiny has been applied to commercial speech cases, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) (establishing four-part test for commercial speech regulation), and to examine the validity of time, place, and manner regulations, *see United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L.Ed.2d 736 (1983) (invalidating statute prohibiting displaying flag, banner or device in Supreme Court building or on its grounds).

Admittedly, the intermediate scrutiny test applied varies to some extent from context to context, and case to case. But it always encompasses some balancing of the state interest and the means used to effectuate that interest. And despite the frequent tendency to assume that regulations that are reviewed under less exacting scrutiny than strict scrutiny will be upheld, each of the cases referred to above as applying intermediate scrutiny held that the regulation in question was unconstitutional. The reasons varied. Sometimes, the Court held the asserted government interest insufficient to justify an expansive prohibition and noted the government failed to demonstrate that a lesser prohibition would not adequately serve its purpose. *See, e.g., Schneider v. State*, 308 U.S. 147, 162, 60 S. Ct. 146, 84 L.Ed. 155 (1939) (holding that state interest in pre-

venting littering did not justify ban on leafletting); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980) (invalidating prohibition on charitable solicitations for certain charities as too destructive of First Amendment interests). Other times, the Court held the government failed to show that the challenged regulation substantially served the asserted government interest. *See, e.g., Grace*, 461 U.S. at 182, 103 S. Ct. 1702. It should also be noted that in making the examination into whether the means chosen were those appropriate to the government interest, the Court has not always made a distinction between its analysis for purposes of intermediate scrutiny and for strict scrutiny. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983) (invalidating candidate registration statute because voters' associational and voting rights outweighed state interest).

The test usually applied in First Amendment cases to content-neutral regulation requires an examination of whether the regulation is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984). There is a considerable number of First Amendment cases in which the Supreme Court, applying intermediate scrutiny, has found that the regulation at issue, albeit designed to advance legitimate state interests, failed to withstand that scrutiny. A review of illustrative cases provides some indication of the Court's analytic approach in such instances.

In *Schneider*, the Court recognized that there is a legitimate government interest in preventing street littering but nevertheless found that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." 308 U.S. at 162, 60 S. Ct. 146. The Court termed the burden imposed on the cities in cleaning and caring for the streets "an indirect consequence of such distribution," and one that resulted from the "constitutional protection of the freedom of speech and press." *Id.* The Court continued, in language significant for this case, "[t]here are obvious methods of preventing littering. Amongst these is *the punishment of those who actually throw papers on the streets.*" *Id.* (emphasis added).

Similarly, in *Village of Schaumburg*, the Court recognized that the government had a substantial interest in protecting the public from fraud, crime and undue annoyance, but held that the proffered interest, which the government sought to accomplish by an ordinance that prohibited the solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes," was "only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests." 444 U.S. at 636, 100 S. Ct. 826.

Both *Schneider* and *Schaumburg* were cited by the Court in a later case to illustrate "the delicate and difficult task [that] falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the

free enjoyment of [First Amendment] rights." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70, 101 S. Ct. 2176, 68 L.Ed.2d 671 (1981) (quoting *Schneider*, 308 U.S. at 161, 60 S. Ct. 146). In *Schad*, the Court invalidated a zoning ordinance that excluded live entertainment, including nude dancing, throughout the borough after finding that the borough "ha[d] not adequately justified its substantial restriction of protected activity." *Id.* at 72, 101 S. Ct. 2176. Justice Blackmun's concurring opinion makes clear that the burden to "articulate, and support, a reasoned and significant basis" for the governmental regulation should not be viewed as de minimis, even when the regulation is subjected to intermediate scrutiny. *Id.* at 77, 101 S. Ct. 2176; *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 52-53 (1987) (describing intermediate scrutiny as a test that "takes seriously the inquiries into the substantiality of the governmental interest and the availability of less restrictive alternatives.").

With the Supreme Court precedent as a guide, we examine whether the government has shown that its proffered interest is sufficiently furthered by application to these defendants of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake.

As noted above, the United States contends that the Wiretapping Acts serve the government's interest in protecting privacy by helping "maintain the confidentiality of wire, electronic, and oral communications." United States' Br. at 33. Undoubtedly, this is a significant state interest. We do not understand the defendants to deny that there is an important governmental interest served by the Wiretapping Acts. However, the government recognizes that not all of the provisions of the Wiretapping Acts are being challenged. In fact, only a portion of those Acts are at issue here—the provisions imposing damages and counsel fees for the use and disclosure of intercepted material on those who played no part in the interception.

The United States asserts that these provisions protect the confidentiality of communications in two ways: (1) "by denying the wrongdoer the fruits of his labor" and (2) "by eliminating the demand for those fruits by third parties." United States' Br. at 33. In this case, however, there is no question of "denying the wrongdoer the fruits of his labor." The record is devoid of any allegation that the defendants encouraged or participated in the interception in a way that would justify characterizing them as "wrongdoers." Thus, the application of these provisions to penalize an individual or radio stations who did participate in the interception and thereafter disclosed the intercepted material is not before us.

We therefore focus on the United States' second contention—that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties. The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor

has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors.[5] Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to deter interception. *See Village of Schaumburg*, 444 U.S. at 636, 100 S. Ct. 826.

When the state seeks to effectuate legitimate state interests,

> it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

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[5] As the Supreme Court recently emphasized in invalidating a prohibition on the receipt of honoraria by government employees, "[w]hen the government defends a regulation on speech . . . it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and *that the regulation will in fact alleviate these harms in a direct and material way.*" *United States v. National Treasury Employees Union*, 513 U.S. 454, 475, 115 S. Ct. 1003, 130 L.Ed.2d 964 (1995) (citation and internal quotation omitted) (emphasis added).

> *Hynes v. Mayor of Oradell*, 425 U.S. at 620, 96 S. Ct. 1755; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted).

Village of Schaumburg, 444 U.S. at 637, 100 S. Ct. 826.

In *Village of Schaumburg*, the Court stated that the Village's legitimate interest in preventing fraud could be better served by requiring solicitors to inform the public of the uses made of their contributions, than by prohibiting solicitation. *Id.* Similarly, in *Martin v. Struthers*, 319 U.S. 141, 147-48, 63 S. Ct. 862, 87 L.Ed. 1313 (1943), the Court held that in lieu of a complete prohibition of door-to-door solicitation, with its draconian impact on First Amendment values, the City could have used the less restrictive means of punishing those who trespass "in defiance of the previously expressed will of the occupant." Indeed, the Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *See Schneider*, 308 U.S. at 162, 60 S. Ct. 146 (city should prevent littering by punishing litterers, not by prohibiting leafleting). Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

We are also concerned that the provisions will deter significantly more speech than is necessary to serve the government's asserted interest. It is likely that in many instances these provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts.

Reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source. Moreover, defendants argue that they cannot be held liable for use and publication of information that had previously been disclosed. Assuming this is so, reporters may have difficulty discerning whether material they are considering publishing has previously been disclosed to the public. Such uncertainty could lead a cautious reporter not to disclose information of public concern for fear of violating the Wiretapping Acts.

Bartnicki and Kane recognize that the Supreme Court has frequently expressed concern about the "timidity and self-censorship" that may result from permitting the media to be punished for publishing certain truthful information. *See, e.g., Florida Star*, 491 U.S. at 535, 109 S. Ct. 2603; *Cox Broadcasting*, 420 U.S. at 496, 95 S. Ct. 1029. The public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later

acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance. Our concerns are only heightened by the Supreme Court's admonition in *Smith* that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102, 99 S. Ct. 2667.

Our dissenting colleague does not disagree with any of the applicable legal principles. He candidly states that the difference between us is one of "ultimate application of [the agreed upon] analysis to the case at bar." Dissenting Op. at 130. Therefore, we add only a few brief comments pertaining to that application.

Evidently, one of the principal differences between our respective applications lies in the weight we give the factors to be balanced. The dissent suggests the Supreme Court's decisions in *Schneider*, *Struthers*, and *Schaumburg* are not pertinent to this case because the state interests in those cases (littered streets, annoying door-to-door proselytizers,[6] and fraudulent charitable solicitors, respectively) were "not very important." The dissent contrasts those interests with the significant governmental interest at issue here—that of maintaining the confidentiality of wire, electronic, and oral communications.

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[6] The dissent fails to mention that one of the purposes for the ordinance referred to by the Court in *Struthers* was crime prevention. *See* 319 U.S. at 144-45, 63 S. Ct. 862.

Presumably, the dissent's point is that we must weigh more heavily the privacy interests furthered by the Wiretapping Acts than the Court weighed the state interests in the three cited cases. Given the conceded importance of privacy and confidentiality at issue here, we nonetheless find it difficult to accord it more weight than the interests in preventing disclosure of the name of a rape victim, the identity of a judge in a putative disciplinary proceeding, or the identity of a youth charged as a juvenile offender at issue in *Cox Broadcasting*, *Landmark Communications* and *Smith*, respectively. Yet when faced with each of those circumstances, the Supreme Court determined that despite the strong privacy interest underlying the statutory and state constitutional provisions punishing disclosure of such information, the interests served by the First Amendment must take precedence.[7] It would be difficult to hold that privacy of telephone conversations are more "important" than the privacy interests the states unsuccessfully championed in those cases.

In addition, we do not share the dissent's confidence that imposition of civil liability on those who neither participated in nor encouraged the interception is an effective deterrent to such interception. The dissent finds such a nexus in the legislative landscape, where

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[7] Although we acknowledge that those decisions arose from a stricter level of scrutiny than we employ here and somewhat different circumstances, the fact remains that the Court has generally tilted for the First Amendment in the tension between press freedom and privacy rights. This is bemoaned by the dissenting Justices in *The Florida Star*, who state candidly they "would strike the balance rather differently." 491 U.S. at 552, 109 S. Ct. 2603 (White, J., dissenting). So, apparently, would the dissent in this case.

half of the states that prohibit wiretapping also authorize civil damage actions. With due respect, we find this a slim reed, not only because it appears from the dissent's statistics that the other half of the states with wiretapping statutes have not included a damage provision but because the incidence of state statutes, and hence "widespread legislative consensus," does not prove the deterrent effect of the prohibition. Indeed, there is not even general agreement as to the deterrent effect of a criminal statute on the perpetrator,[8] much less on those who were not in league with the perpetrator. In determining whether a regulation that restricts First Amendment rights "substantially serves [its asserted] purposes," *see Grace*, 461 U.S. at 182, 103 S. Ct. 1702, the Court has never found that question satisfied by sheer numbers of state statutes.

The dissent engages in hyperbole when it suggests that our decision "invalidates a portion of the federal statute" and "by necessary implication spells the demise of a portion of more than twenty other state statutes." Dissenting Op. at 134. The statutes, which are designed to prohibit and punish wiretapping, remain unimpaired. All that is at issue is the application of those statutes to punish members of the media who neither encouraged nor participated directly or indirectly in the interception, an application rarely attempted.

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[8] The opposing views of deterrence were noted in connection with capital punishment in Chief Justice Burger's dissenting opinion in *Furman v. Georgia*, 408 U.S. 238, 395-96, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

Moreover, we do not agree that the recent decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), presented that court with the same issue presented here. Most particularly, in *Boehner*, where a divided court upheld the constitutionality of § 2511(1)(c), all three judges emphasized in their separate opinions that there was no effort to impose civil damages on the newspapers (The New York Times, *et al.*) which had printed the details of a conversation that been [*sic*] illegally intercepted. Thus, for example, in the lead opinion the court stated at the outset, "[n]or should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." *Id.* at 467. Liability in that case was sought to be imposed on James McDermott, a congressman who caused a copy of the tape to be given to the newspapers. Although technically, defendant Yocum in our case stands in the same position as McDermott, i.e. as the source but not the interceptor, there is an indication in *Boehner* that McDermott was more than merely an innocent conduit. Indeed, McDermott, unlike Yocum, knew who intercepted the conversation because he "accepted" the tape from the interceptors and, the opinion suggests, not only sought to embarrass his political opponents with the tape but also promised the interceptors immunity for their illegal conduct. *Id.* at 475-76. In fact, the second judge, who concurred in the judgment and in only a portion of the opinion for the court, specifically limited his concurrence to the decision that § 2511(1)(c) "is not unconstitutional *as applied in this case*," *id.* at 478 (emphasis added), and pointed out that "McDermott knew the transaction was illegal at the time he entered into it," *id.* at 479. In contrast, Yocum has not been shown to have "entered into" any transaction with the interceptors. In the posture of this case, all parties accept his allegation that the tape was left in his mailbox.

The *Boehner* court was acutely aware that no court has yet held that the government may punish the press through imposition of damages merely for publishing information of public significance because its original source acquired that information in violation of a federal or state statute. *Cf. Landmark*, 435 U.S. at 837, 98 S. Ct. 1535 (finding it unnecessary to adopt categorical approach). As noted earlier in this opinion, the Supreme Court has been asked to permit a state to penalize the publication of truthful information in at least four instances. In three of the four cases, the statutes at issue protected the privacy interests of such vulnerable individuals as juveniles and the victims of sexual assault. *See Florida Star*, 491 U.S. at 526, 109 S. Ct. 2603; *Smith*, 443 U.S. at 98, 99 S. Ct. 2667; *Cox Broadcasting*, 420 U.S. at 472, 95 S. Ct. 1029. In the remaining case, the statute at issue was meant to protect the state's interest in an independent and ethical judiciary. *See Landmark*, 435 U.S. at 830, 98 S. Ct. 1535. Despite the strength of the state interests asserted, the Supreme Court in each case concluded that those interests were insufficient to justify the burdens imposed on First Amendment freedoms.

We likewise conclude that the government's significant interest in protecting privacy is not sufficient to justify the serious burdens the damages provisions of the Wiretapping Acts place on free speech. We are skeptical that the burden these provisions place on speech will serve to advance the government's goals. Even assuming the provisions might advance these interests, the practical impact on speech is likely to be

"substantially broader than necessary." *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989).

We therefore hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception. It follows that we need not decide whether these provisions leave open ample alternative channels for communication of information.

III.

CONCLUSION

For the reasons set forth, we will reverse the order of the District Court denying summary judgment to the defendants, and will remand with directions to grant that motion.

POLLAK, District Judge, dissenting.

The Court of Appeals for the District of Columbia Circuit has recently determined, in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), that the First Amendment does not bar a civil damage action brought, pursuant to 18 U.S.C. § 2511(1)(c) and 18 U.S.C. § 2520(a), and pursuant to the Florida statutory provisions that are counterparts of the federal statute, against one who, so the plaintiff alleged, gave to the *New York Times* and other newspapers copies of a tape recording of a telephone conversation which the defendant had "knowledge and reason to know" had

been unlawfully intercepted.[1] Today this court holds that the First Amendment does bar a civil damage

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[1] In *Boehner v. McDermott*, the plaintiff, John Boehner, is a Republican Representative who, together with other members of the Republican leadership of the House of Representatives (including then Speaker Gingrich), was in 1996 party to a conference telephone call that was unlawfully intercepted by persons equipped with a radio scanner. According to Representative Boehner's complaint, the interceptors turned over the tape to James A. McDermott, a Democratic Representative who was at the time the ranking minority member of the House Ethics Committee; Representative McDermott in turn gave copies of the tape to the *New York Times* and other newspapers; and the *New York Times* promptly published part of the taped conversation. Representative Boehner sued Representative McDermott, but did not sue the *New York Times* or any other newspaper. The district court dismissed Representative Boehner's complaint on First Amendment grounds. The circuit court reversed.

The circuit court perceived a potentially important distinction between Representative McDermott's First Amendment claim and the First Amendment claim that might have been made by the *New York Times* or another newspaper, if a newspaper had been named as a defendant. Identifying that potential distinction, the court was at pains to confine its analysis to Representative McDermott's claim:

> McDermott's liability under § 2511(1)(c) rests on the truth of two allegations: that he "caused a copy of the tape" to be given to the newspapers; and that he "did so intentionally and with knowledge and reason to know that the recorded phone conversation had been illegally intercepted (as the cover letter on its face disclosed)." Complaint ¶ 20. Although the circumstances of McDermott's transactions with the newspapers, including who said what to whom, may become evidence at trial, it is his conduct in delivering the tape that gives rise to his potential liability under § 2511(1)(c). McDermott's behavior in turning over the tapes doubtless conveyed a message, expressing something about him. All behavior does. But not all behavior comes within the First Amendment.

action brought, pursuant to the Federal statute and its Pennsylvania counterpart, against (1) one who handed over a copy of a taped telephone conversation to a radio reporter, and (2) the radio reporter and the two radio stations that subsequently broadcast the tape, plaintiffs having alleged that both the person who handed over the tape and the radio reporter had, in the statutory language, "reason to know" that the taped conversation had been intercepted in contravention of the federal and Pennsylvania statutes. In the case decided today the court addresses a broader range of issues then those presented in *Boehner v. McDermott*: in *Boehner*

"[E]ven on the assumption that there was [some] communicative element in" McDermott's conduct, the Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968). The *O'Brien* framework is the proper mode of First Amendment analysis in this case. McDermott's challenge is only to the statute as it applies to his delivery of the tape to newspapers. Whether a different analysis would govern if, for instance, McDermott violated § 2511(1)(c) by reading a transcript of the tape in a news conference, is therefore a question not presented here. Nor should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone.

191 F.3d at 467.

The author of the court's opinion was Judge Randolph. Judge Ginsburg filed a concurring opinion, joining part (including the paragraphs just quoted) of Judge Randolph's opinion. Judge Santelle [sic] filed a dissenting opinion.

v. McDermott the only defendant was the person who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation; in today's case there are three "media defendants" in addition to the defendant who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation.[2]

I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's ultimate application of its analysis to the case at bar.

Accordingly, I respectfully dissent.[3]

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[2] The *Boehner v. McDermott* court was at pains to point out the limited scope of its ruling. *See* note 1, *supra*. *See also* note 3, *infra*.

[3] Although I have expressed general agreement with the court's analytic approach, I should note one aspect of the analysis on which I differ with the court. That aspect is cogently illustrated by the distinction the *Boehner v. McDermott* court drew between the First Amendment posture of Representative McDermott and the potential First Amendment posture of a newspaper that published (as the *New York Times* in fact did) a portion of the intercepted telephone conference call, had such a newspaper been sued. As the *Boehner v. McDermott* excerpt quoted in footnote 1, *supra*, makes clear, the court was doubtful that Representative McDermott's action in giving copies of the tape to newspapers was itself "speech" in the full First Amendment sense. Judge Randolph, speaking for the court, saw Representative McDermott's First Amendment claim as cabined by the Supreme Court's holding in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968), that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech

I.

I agree with the court's statement of the case. And I agree with the court's determination that the challenged federal and Pennsylvania wiretapping statutes—here invoked by plaintiffs seeking damages for defendants' alleged disclosure and use of a taped telephone conversation of plaintiffs that defendants allegedly had "reason to know" was the product of a prohibited "interception of a wire . . . communication," 18 U.S.C. § 2511(c); 18 Pa. Cons. Stat. § 5703(2)—are "content neutral." I further agree with the court that the proper standard to be applied in testing the constitutionality of the federal and Pennsylvania statutes as here applied is "intermediate

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element can justify incidental limitations on First Amendment freedoms."

In the case at bar, in which the plaintiffs have sued both Yocum and media defendants, the United States argues that the approach reflected in *O'Brien* and cases that follow it is appropriate to the entire case. The court rejects that view. I find the *Boehner v. McDermott* exposition of Representative McDermott's limited First Amendment posture persuasive, and thus in the case at bar I would apply the *O'Brien* approach to defendant Yocum—whose role, from a First Amendment perspective, seems analogous to that of Representative McDermott—while rejecting *O'Brien* as the proper approach to the First Amendment claims of the media defendants. However, the distinction is not one that I need pursue, because, accepting for the purposes of the case at bar the court's comprehensive rejection of *O'Brien*, I nonetheless wind up disagreeing with the court on how the court's analytic approach plays out as applied, with the result that I conclude that liability in damages could constitutionally have been imposed both on Yocum and on the media defendants if the plaintiffs had been permitted to take their case to trial and had proved their allegations to the satisfaction of the fact-finder.

scrutiny." Finally, I agree with the court that intermediate scrutiny "always encompasses some balancing of the state interest and the means used to effectuate that interest." Op., p. 124. Concretely, such scrutiny calls for judicial assessment of whether the challenged regulation is "narrowly tailored to serve a significant governmental interest." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984).[4]

Where I part company with the court is in its application of intermediate scrutiny in this case.

A.

The court begins by acknowledging what I take to be beyond dispute: namely, that the professed governmental interest—the interest of the United States (which is presumably also Pennsylvania's interest) in "maintain[ing] the confidentiality of wire, electronic, and oral communications," Brief for the United States, p. 33—is "a significant state interest." Op., *supra*, p. 125. Then—evidently with a view to exploring whether the challenged prohibition on disclosure or use of a conversation by one who had "reason to know" that the conversation was intercepted unlawfully is "narrowly tailored to serve [that] signifi-

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[4] The other criterion identified in *Clark v. Community for Creative Non-Violence*—namely, whether the challenged regulation "leave[s] open ample alternative channels for communication of the information" 468 U.S. at 293, 104 S. Ct. 3065—is not pertinent to the case at bar because the challenged statutes are not, as the challenged regulations in *Clark v. Community for Creative Non-Violence* were deemed to be, "time, place or manner restrictions." *Ibid.* And see *id.* at 295, 104 S. Ct. 3065.

cant governmental interest"—the court undertakes to "focus on the United States' . . . contention . . . that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." Op., p. 125. The court then proceeds as follows:

> The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors. Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute actually produces the hypothesized effect. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to

> deter interception. *See Village of Schaumburg*, 444 U.S. at 636, 100 S. Ct. 826.

When the state seeks to effectuate legitimate state interests,

> it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell*, 425 U.S. at 620, 96 S. Ct. 1755; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted).

Village of Schaumburg, 444 U.S. at 637, 100 S. Ct. 826.

In *Village of Schaumburg*, the Court stated that the Village's legitimate interest in preventing fraud could be better served by requiring solicitors to inform the public of the uses made of their contributions, than by prohibiting solicitation. *Id.* Similarly, in *Martin v. Struthers*, 319 U.S. 141, 147-48, 63 S. Ct. 862, 87 L.Ed. 1313 (1943), the Court held that in lieu of a complete prohibition of door-to-door solicitation, with its draconian impact on First Amendment values, the City could have used the less restrictive means of punishing those who trespass "in defiance of the previously expressed will of the occupant." Indeed, the Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *See Schneider*, 308 U.S. at 162, 60 S. Ct. 146 (city should prevent

littering by punishing litterers, not by prohibiting leafleting). Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

Op. p. 125-27.

With all respect, I find this portion of the court's opinion unpersuasive:

First: I take issue with the proposition that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." "[P]reventing the initial interception" is only part of the statutory scheme. The statutory purposes, as the court has noted, are "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. Unauthorized interception of a communication is prohibited—and made both a criminal offense and an event giving rise to civil liability—both to protect parties to a communication from an initial trespass on their privacy and to protect them from subsequent disclosure (and/or other detrimental use). "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to

prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of non-disclosure." *Boehner v. McDermott*, 191 F.3d at 470.

Second: Given the close nexus between the legislative prohibition on unauthorized interception and the legislative imposition upon "third parties, that is, upon those not responsible for the interception, [of] a duty of non-disclosure," I am puzzled by the court's view that the argument presented by the United States in support of the statutory regime of civil liability lacks persuasiveness because it is not supported by a demonstration that "imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation," or "that these [statutory] provisions have deterred any other would-be interceptors." Nor do I think the court's view is buttressed by the court's invocation of *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L.Ed.2d 1 (1978). It is true that in *Landmark*, in which the Supreme Court struck down, as applied to a newspaper, a statute making it a misdemeanor to "divulge information" about confidential proceedings conducted by Virginia's Judicial Inquiry and Review Commission, the Court observed that "[t]he Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme [which contemplated a process of confidential

inquiry into alleged judicial misconduct] would be seriously undermined." But the special—and limited—pertinence of the Court's observation becomes clear when it is read in context. The full paragraph follows:

> It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants such as Landmark. The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.

435 U.S. at 841, 98 S. Ct. 1535. In striking contrast is the legislative landscape that forms the setting of the case at bar. Complementing the federal statute are more than forty state wiretapping statutes. Of these state statutes, approximately half have provisions which, like the federal statute, (1) prohibit disclosure or use of an intercepted conversation by one who knows or has "reason to know" that the interception was unlawful, and (2) authorize civil damage actions against one who discloses or uses such unlawful interception. As this case illustrates, Pennsylvania is one of those states. So are Delaware and New Jersey—Pennsylvania's Third Circuit siblings. See 11 Del. Code Ann., § 1336 (1996); N.J. Stat. Ann. §§ 2A-156-A-3; 2A-156-A-24 (West 1985 & Supp. 1999). Listed in footnote

5 are the other state statutes that closely parallel the provisions of the federal and Pennsylvania legislation challenged by defendants in the case at bar.[5]

In short, there appears to be a widespread legislative consensus that the imposition of civil liability on persons engaged in conduct of the kind attributed to these defendants is an important ingredient of a regime designed to protect the privacy of private conversations. Moreover, the decision announced today not only invalidates a portion of the federal statute and the counterpart portion of the Pennsylvania statute, it by necessary implication spells the demise of a portion of more than twenty other state statutes (and also of a statute of the District of Columbia); in the two centuries of our constitutional history there cannot have been more than a handful of prior decisions, either of a federal court or of a state court, which, in the exercise of the awesome power of judicial review, have cut so wide a swath.

Third: What has been said points up the non-pertinence to the case at bar of *Schneider v. State*, 308

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[5] Fla. Stat. Ann. §§ 934.03, 812.15; Haw. Rev. Stat. §§ 803-42(a)(3), 803-48; Idaho Code §§ 18-6702, 18-6709; 720 Ill. Comp. Stat. Ann. 5/14-2, 5/14-6; Iowa Code §§ 808B.2(1)(c), 808B.8; La. Rev. Stat. Ann. §§ 15:1303 A(3), 15:1312; Md. Code Ann. §§ 10-402(a)(2), 10-410; Mich. Comp. Laws Ann. §§ 750.539e, 750.539h; Minn. Stat. Ann. §§ 626A.02(c), 626A.13; Neb. Rev. Stat. §§ 86-702; N.H. Rev. Stat. Ann. §§ 570-A:2, 570-A:11; N.C. Gen. Stat. §§ 15A-287, 15A-296; Ohio Rev. Code Ann. §§ 2933.52, 2933.65; Tenn. Code Ann. §§ 39-13-601, 39-13-603; Utah Code Ann. §§ 77-23a-4, 77-23a-11; Va. Code Ann. §§ 19.2-62, 19.2-69; W. Va. Code §§ 62-1D-3, 62-1D-12; Wis. Stat. § 968.31; Wyo. Stat. Ann. §§ 7-3-602, 7-3-609; See also D.C. Code Ann. §§ 23-542, 23-554.

U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939), *Martin v. Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L.Ed. 1313 (1943), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980), cases cited by the court as illustrative of the proposition that regulations designed to promote significant governmental interests should not sweep so broadly as to impose unnecessary constraints on First Amendment rights of free expression and communication. The constitutional shortcomings in *Schneider* (combating the littering of streets by curbing leafleting), *Struthers* (banning door-to-door distribution of circulars, including religious literature, in order to protect homeowners from annoyance), and *Village of Schaumburg* (combating allegedly fraudulent charitable solicitation by banning all solicitation by groups not disbursing 75% of receipts) involved situations in which small towns imposed on traditional First Amendment activities pervasive constraints sought to be justified as ways of dealing with distinct (and not very important) problems that could have been more effectively addressed by governmental action directed at the actual problems—e.g., prosecuting litterers (*Schneider*); prosecuting as trespassers solicitors who do not depart when requested by homeowners to do so (*Struthers*); requiring organizations soliciting contributions to disclose how receipts are used (*Village of Schaumburg*). In the case at bar, unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat.

B.

The court also notes that "[r]eporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source," or, indeed, "whether material they are considering publishing has previously been disclosed to the public." Op., p. 127, As a result, the court opines, "[i]t is likely that in many instances these [challenged statutory] provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts." *Ibid.*

I think the court overstates the potential problems of the media. One would suppose that a responsible journalist—whether press or broadcast—would be unlikely to propose publication of a transcript of an apparently newsworthy conversation without some effort to insure that the conversation in fact took place and to authenticate the identities of the parties to the conversation. As part of such an inquiry, the question whether the parties to the conversation had authorized its recording and release, or whether others had lawfully intercepted the conversation, would seem naturally to arise. Moreover, current technology would make it relatively easy to determine whether the conversation had been the subject of a prior press or broadcast report.[6]

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[6] On occasion, inquiry of the kind suggested might indeed take a few days. But news reporting—especially with respect to events (such as a conversation) that are concluded, rather than still evolving—need not be an instant process. In the case at bar, it appears that defendant Vopper did not broadcast the conversation

In my judgment, a more substantial First Amendment difficulty is posed by the fact that the person or entity charged with knowing or having "reason to know" that a published conversation was unlawfully intercepted is called on to contest before a judicial fact-finder (whether jury or judge) a plaintiff's allegation of knowledge or "reason to know." But the difficulties attendant on fact-finder oversight of journalistic practice (or, indeed, of public disclosure by non-journalists) can, I believe, be met by adoption of the procedural proposals advanced in the brief for the United States:

> In criminal prosecutions under Title III, *scienter* must be proved beyond a reasonable doubt. In civil cases *scienter* ordinarily would be subject to a conventional preponderance-of-the-evidence standard. When a claim is brought for disclosure of information about matters of public significance by persons who were not involved in the illegal interception, however, a preponderance-of-the-evidence standard may operate to deter the publication of information that was *not* the product of illegal surveillance. To avoid that result, it might prove

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until some months after defendant Yocum gave him a copy of the tape. Deposition of Frederick W. Vopper, App. 60a-61a. On the other hand, the *New York Times* published a portion of the intercepted conversation that gave rise to *Boehner v. McDermott* the day after it received the tape. The *New York Times* story also reported that the tape had been "made . . . available to the New York Times" by "a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further" and who told the *Times* that the tape had been given to him [on January 8, 1997] by a couple who said the tape "had been recorded [on December 21, 1996] off a radio scanner, suggesting that one participant was using a cellular telephone." N.Y. Times, January 10, 1997, p. 1, col.3.

> appropriate for district courts to impose a higher standard of proof of *scienter* in such cases, such as proof by "clear and convincing" evidence, and for appellate courts to conduct independent review of the findings of the trier of fact. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974) (requiring clear and convincing evidence of "actual malice" in defamation cases); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511, 104 S. Ct. 1949, 80 L.Ed.2d 502 (1984) (*de novo* appellate review of findings regarding actual malice). See generally *Waters v. Churchill*, 511 U.S. 661, 669-71, 114 S. Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) (discussing circumstances in which First Amendment requires modifications of burdens of proof and other procedural rules).

Brief for the United States, pp. 40-41 n. 8.[7]

II.

As the court's opinion makes plain, the First Amendment values of free speech and press are among the values most cherished in the American social order.

---

[7] The court's decision has the anomalous consequence of cloaking Yocum, who is not a "media defendant", with the First Amendment protections the court deems appropriate for radio reporter Vopper and the two radio stations. I have undertaken to explain in footnote 3, *supra*, that in my judgment Yocum has a far more tenuous First Amendment claim (if any) than the media defendants. I do not think that, merely by virtue of the fortuity that the plaintiffs have elected to sue Yocum and the media defendants (which the plaintiff in *Boehner v. McDermott* did not do), Yocum becomes a third-party beneficiary of whatever First Amendment protections may accrue to the media defendants.

Maintenance of these values (and the other values of the Bill of Rights) against overreaching by the legislature or the executive is among the judiciary's major and most demanding responsibilities. In the case at bar, however, the First Amendment values on which defendants take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable —indeed kindred—dimension. Three decades ago the late Chief Judge Fuld of the New York Court of Appeals put the matter well in *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 244 N.E.2d 250, 255 (1968) (in words that the Supreme Court has quoted with approval, *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 560, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985)):

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 3:CV-94-1201
(Judge Kosik)

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PLAINTIFFS

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE
AND JOHN DOE, AND JACK YOCUM, DEFENDANTS

[Filed: June 17, 1995]

MEMORANDUM

Before the court are respective motions for summary judgment filed by Plaintiffs Bartnicki and Kane; Defendant Yocum; and Defendants Frederick Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio (Media Defendants). The matter involves allegations of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511, 2520, and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. § 5701 *et seq.* [hereinafter electronic surveillance acts]. For

the following reasons, we deny the motions for summary judgment.

I. Background

Plaintiff Gloria Bartnicki is employed by the Pennsylvania State Education Association (PSEA) and, at relevant times, was assigned as a negotiator in a contract dispute between the teachers' union and Wyoming Valley West School District. Plaintiff Anthony Kane, Jr., was a teacher at Wyoming Valley West High School and president of the PSEA's local union representing the teachers of the school district.

During the pendency of the negotiations between the teachers' union and the school board, a citizens group, Wyoming Valley West Taxpayers Association (Association), was formed for the purpose of opposing the union's proposals. Defendant Jack Yocum was president of the Association.

It is represented that the contract negotiations were the regular subject of the local media.

In May of 1993, Plaintiffs Bartnicki and Kane engaged in a telephone conversation about the union's demands and the negotiations. The conversation occurred via a transmission from Plaintiff Bartnicki's cellular car phone and Plaintiff's Kane conventional household telephone line. The conversation was intercepted and recorded by an unidentified party. The Plaintiffs allege that the interception of their communi-

cation was intentional, while the Defendants argue that the interception was inadvertent and unintentional.[1]

The Defendants' acquisition of the intercepted communication allegedly occurred as follows. A cassette containing a recording of the conversation was placed in Defendant Yocum's mailbox without any markings identifying the depositing party or the person who made the recording. Defendant Yocum played the tape and recognized the voices as those belonging to the Plaintiffs.

There exists some dispute as to whom Defendant Yocum played the tape, but it is undisputed that Defendant Yocum provided Defendant Vopper of Defendant WILK's radio station with the recording. The recording was aired during Defendant Vopper's radio program.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure states:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[2]

---

[1] Both parties have failed to supply any facts regarding the interception. However, both parties supply the court with theories on the methods of intercepting cellular communications.

[2] Fed. R. Civ. P. 56.

The Supreme Court has held that Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2551 (1986). Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *see also Gile v. Optical Radiation Corp.*, 22 F.3d 540, 541 (3d Cir.), *cert. denied*, 115 S. Ct. 429 (1994).

Initially, to support its motion for summary judgment, the moving party must show the absence of a genuine issue concerning any material fact. *Celotex*, 477 U.S. at 322-23. Once the moving party has satisfied its burden, the non-moving party must present "affirmative evidence" to defeat the motion for summary judgment, consisting of verified or documented materials. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 3189 (1990); *Anderson*, 477 U.S. at 256-57. Mere conclusory allegations or denials taken from the pleadings are insufficient. *Schoch v. First Fidelity*, 912 F.2d 654, 657 (3d Cir. 1990) (citations omitted).

In evaluating a motion for summary judgment, the entire record must be examined in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences derived from the evidence. *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3d Cir. 1994); *White v. Westinghouse Electric Company*, 862 F.2d 56, 59 (3d Cir. 1988).

III. DISCUSSION

Media Defendants motion this court for the granting of summary judgment because 1) they did not violate the electronic surveillance acts and 2) they are protected by the First Amendment.

Media Defendants' first argument is that they did not violate the applicable statutory provisions. *See* Document 56 at 12. In moving for summary judgment, Media Defendants state that the record establishes that Media Defendants did not intercept or tape the electronic communication between the Plaintiffs. We agree that there exists no genuine issue as to this fact, but that is not dispositive of Media Defendants' compliance with the electronic surveillance acts. The federal statute provides that a person violates the act if he "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or *having reason to know* that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c) (1996) (emphasis added). The state electronic surveillance statute parallels the federal statutory language. *See* 18 Pa. Con. Stat. § 5703. Accordingly, a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception. Such an interpretation of the statute adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such. To allow a third party who is provided access to the intercepted communications to use the contents of the

intercepted communications knowing or having reason to know that such communications were illegally intercepted would defeat the purpose of both the federal and state act. *See Natoli v. Sullivan*, 606 N.Y.2d 504, 507 (N.Y. Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994).

In reviewing the record, we believe that there exists a genuine issue as to a material fact as to whether Media Defendants knew or had reason to know that the communication was illegally intercepted. *See Forsyth v. Barr*, 19 F.3d 1527, 1539 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994). Media Defendants point out that there exists a great likelihood that the conversation was inadvertently intercepted and recorded, thus outside the scope of both statutory provisions. *See* Document 56 at 7-8 (providing circumstances in which the cellular conversation might have been intercepted unintentionally); Document 72 at 2 (citing *Bayges v. SEPTA*, 144 F.R.D. 269, 271-72 (E.D. Pa. 1992), for the proposition that unintentional interceptions do not offend the statute). On the other hand, the Plaintiffs note that there exists references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone, as well as the relative difficulty in intercepting such a communication. *See* Document 53 at 7-10; Document 54; Document 68 at 9-13. Therefore, Media Defendants' motion for summary judgment as it pertains to the argument that they did not violate the electronic surveillance acts is denied.

Defendant Yocum moves for summary judgment also alleging that he was not involved in intercepting the communication and that the communication may have

been legally intercepted. *See* Document 45; Document 49 at 13-18. The record reflects that Defendant Yocum used and disclosed the contents of the conversation, as evidenced in his uncontroverted disclosure of the recording to Media Defendants. In accordance with our analysis of Media Defendants' argument on this issue, we find that there exists a genuine issue of material facts as it pertains to Defendant Yocum knowing or having reason to know that the communications were illegally intercepted. Therefore, it is inappropriate for us to grant summary judgment to Defendant Yocum on this ground.

Media Defendants also move for summary judgment based on their First Amendment rights. They assert that the broadcasting of the audiotape which was "newsworthy" was protected by the First Amendment and therefore was not prohibited by the electronic surveillance acts.

Media Defendants correctly note that it is well-established that where the media lawfully obtains truthful information about a matter of public significance or concern, government officials may not constitutionally punish the publication of that information absent the need to further a government interest of a higher order. *See* Document 56 at 14 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535 (1978); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667; *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989); *Oklahoma Publishing Co. v. United States*, 515 F. Supp. 1255, 1259 (W.D. Ok. 1981)). However, these cases addressed matters where a state actor attempted to place a prior restraint on

specified speech or where the intentional interception was legal but the disclosure was illegal.

In the matter before this court, there exist no statutory provisions specifically designed to chill free speech. Rather, at issue is the federal and state electronic surveillance laws which are general application laws. These surveillance laws apply equally to the general public and impose no further restrictions on the media. Accordingly, there exists no indicia of prior restraint or the chilling of free speech.

The Supreme Court has specifically addressed the constitutionality of general application laws as they pertain to the media. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668-70, 111 S. Ct. 2513, 2518 (1991). The Supreme Court in *Cohen* addressed the imposition of a fine levied against a publisher for the publication of a confidential informant's identity. The case was analyzed pursuant to Minnesota's doctrine of promissory estoppel, and the Court deemed the doctrine as one of general applicability. *See id.* at 670. The Court, in distinguishing a similar line of cases that Media Defendants here rely on, stated that it is "well-established" that generally applicable laws "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. The Court recognized that such a statement applies even when the information obtained was truthful because, as the Court stated, "it is beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.* at 670 (internal quotation marks omitted).

In reviewing both the federal and the state electronic surveillance laws, we conclude that both acts are matters of general applicability. We do not find that the statutes target or single out the press. We, therefore, deny Media Defendants' motion for summary judgment as it applies to this argument.

Defendant Yocum, in his motion for summary judgment, additionally argues that he was a "newsgather" for Media Defendants and therefore should be afforded the same First Amendment protections. *See* Document 49 at 19-21. The same analysis applies, and Defendant Yocum's motion for summary judgment on the basis of the First Amendment also fails.

Plaintiffs Bartnicki and Kane also move this court for summary judgment because "the pleadings and depositions demonstrate that there are no disputed material issues of fact regarding the question of whether the Defendants, Vopper, WILK and Yocum intentionally disclosed and published the surreptitiously taped telephone conversation between the Plaintiffs, Bartnicki and Kane without their permission." *See* Document 40. The Plaintiffs assert that such a showing demonstrates the Defendants' violation of the electronic surveillance acts and entitles them to summary judgment. Although the court agrees that there exists no genuine issue of material fact as it relates to Defendant Yocum using the communication and disclosing it to Media Defendants and to Media Defendants' use and disclosure of the communication to its listening audience, such a showing is insufficient to demonstrate a violation of the applicable statutes.

The electronic surveillance acts seek to impose both criminal and civil sanctions on the interception, use, or disclosure of *illegally* intercepted electronic communications. However, the acts do not impose criminal or civil penalties for legally intercepted communications. For instance, the federal and state electronic surveillance laws do not prohibit the interception, use, or disclosure of unintentionally intercepted communications. *See* 18 U.S.C. § 2511 (1995); 18 Pa. Con. Stat. Ann. § 5704 (1995). The record reveals that there exists a genuine issue of material fact with regard to whether the communication was illegally intercepted. In addition, there exists a genuine issue as to whether the Defendants knew or should have known that the communication was illegally intercepted.

Because the legality of the interception and the Defendants' state of mind are material facts at issue, we deny the Plaintiff's motion for summary judgment.

IV. CONCLUSION

We find that there exists genuine issues as to material facts, and we accordingly deny all the motions for summary judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 3:CV-94-1201
(Judge Kosik)

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PLAINTIFFS

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE
AND JOHN DOE, AND JACK YOCUM, DEFENDANTS

ORDER

AND NOW, this 14th day of June, 1996, IT IS HEREBY ORDERED THAT:

[1] Defendants Frederick Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio's motion for summary judgment [Document 43] is denied;

[2] Defendant Yocum's motion for summary judgment [Document 45] is denied;

[3] Plaintiffs Bartnicki and Kane's motion for summary judgment [Document 40] is denied; and

[4] a pretrial conference shall be set forthwith.

/s/ EDWIN M. KOSIK
EDWIN M. KOSIK
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 3:CV-94-1201
(Judge Kosik)

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PLAINTIFFS

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE
AND JOHN DOE, AND JACK YOCUM, DEFENDANTS

[Filed: Nov. 8, 1996]

MEMORANDUM

Before the court is Defendants' motion to reconsider our decision of June 17, 1996, where we denied the cross motions for summary judgment. *See* Document 73. The matter involves allegations of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2511, 2520, and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. § 5701 *et seq.* [hereinafter acts]. For the following reasons, we deny the motion for reconsideration.

I. STANDARD OF REVIEW

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). As one court has noted:

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983).

Parties must remember that a motion for reconsideration is not an appeal. Therefore, it is improper on a motion for reconsideration for the party to request "the Court to rethink what it had already thought through—rightly or wrongly." *Id.* Thus, a party "must show more than a disagreement with the court's decision." *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 435 (D. N. J. 1991).

III. DISCUSSION

Defendants[1] motion this court to reconsider our denial of summary judgment because 1) Plaintiffs were unable to demonstrate the ability to prove at trial a necessary element of their case, i.e. that the conversation was intentionally intercepted and therefore illegal and 2) Defendants are protected by the First Amendment.

First, Defendants contend that Plaintiffs' failed to demonstrate a material element of their case. Defendants argue that Plaintiffs' were required to show that the interception of the conversation was not inadvertent, and, therefore, illegal. We addressed this issue in detail in our previous Order. Both the federal and state acts impose liability to a user if he "knew or had reason to know" that the communication was intercepted. *See* 18 U.S.C. § 2511 (1996); 18 Pa. C.S.A. § 5703. In addressing these provisions in our previous Order, we stated:

> Accordingly, a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception. Such an interpretation of the statute adheres to the purpose of the act which was to protect wire and oral communications and an

[1] Defendants Frederick Vopper; Keymarket of NEPA, Inc.; and Lackazerne, Inc. (Media Defendants) and Defendant Yocum filed separate motions. *See* Document 75; Document 76. However, both motions address similar issues, and accordingly we need only address the motion for reconsideration in the singular.

> individual's privacy interest in such. To allow a third party who is provided access to the intercepted communications to use the contents of the intercepted communications knowing or having reason to know that such communications w[as] illegally intercepted would defeat the purpose of both the federal and state act.

Document 73 at 5 (citations omitted).

Therefore, a violation of the acts can occur by the mere showing that Defendants "knew or should have known" that the communication was illegally intercepted. In our opinion, we stated:

> In reviewing the record, we believe that there exists a genuine issue as to a material fact as to whether Media Defendants knew or had reason to know that the communication was illegally intercepted. Media Defendants point out that there exists a great likelihood that the conversation was inadvertently intercepted and recorded, thus outside the scope of both statutory provisions. On the other hand, the Plaintiffs note that there exists references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone, as well as the relative difficulty in intercepting such a communication.

Id. at 5-6 (citations omitted).

Remembering that the burden of proof at trial is a preponderance of the evidence, we find that Plaintiffs have sufficiently demonstrated that Defendants "knew or should have known" that the communication was intercepted. As to the illegal element for a violation of

the statute, both sides have offered sufficient theories of how the communication was intercepted. This goes beyond the mere characterization of unsupported allegations with which Defendants attempt to classify Plaintiffs' contentions. Accordingly, we find that there is sufficient evidence on which a reasonable jury could conclude, by a preponderance of the evidence, that Defendants violated the acts. As a result, we believe that Plaintiffs have met their burden.

Defendants have also sought reconsideration of our decision denying them summary judgment pursuant to their First Amendment argument. In seeking to have us reconsider our decision, Defendants cite a Pennsylvania Supreme Court decision that held: "Without dispute, it is in the public interest to have a free press. Thus, the legislature intended for the public interest and a free press to supersede the interest of an individual whose private conversation regarding his illegal activities had been *lawfully intercepted and lawfully obtained* by a newspaper." Document 80 at 5 (citing *Bottger v. Loverro*, 587 A.2d 712, 720-21 (Pa. 1991)) (emphasis added).

We need not discuss this rule because the Pennsylvania Supreme Court's decision clearly was addressing issues involving the lawful interception and lawful acquisition of private conversations pertaining to illegal activities. The focus of this litigation is whether the disclosure was legal pursuant to the acts. In addition, it is disputed that the alleged illegal conduct, "a threat to blow-off a porch," was truly a threat of future illegal activity.

We deny the motions for reconsideration.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CASE NO. 3:94-CV-01201
(Judge Kosik)

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PLAINTIFFS

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO,
AND JACK YOCUM, DEFENDANTS

[Filed: Jan. 7, 1998]

ORDER

IT IS HEREBY CERTIFIED that the Memorandum and Order dated June 14, 1996 denying the Motion for Summary Judgment of the Defendants and the Memorandum and Order of November 8, 1996 which denied the Defendants' Motion to Reconsider the June 17, 1996 decision involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materially advance the ultimate termination of this litigation.

The controlling questions of law are: (1) whether the imposition of liability on the media Defendants under the Federal Electronic Surveillance Statute, 18 U.S.C. §§ 2511, 2520 and under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. § 5701, *et seq.*, solely for broadcasting the newsworthy tape on the Defendant Fred Williams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid Federal and Pennsylvania Electronic Surveillance Statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment. I make this certification pursuant to 28 U.S.C. § 1292(b).

BY THE COURT:

/s/ EDWIN M. KOSIK
EDWIN M. KOSIK
United States District
Judge

Dated: January 7th, 1998

APPENDIX F

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790

P. DOUGLAS SISK
CLERK

TELEPHONE
215-597-2995

October 6, 1998

Via Facsimile and
Regular Mail

David M. Barasch, Esquire,
U.S. Attorney
Office of United States Attorney
Federal Building
228 Walnut Street
P.O. Box 11754
Harrisburg, PA 17108

RE: Bartnicki v. Vopper
No. 98-7156
Listed for Disposition: October 5, 1998

Dear Mr. Barasch:

The Court wishes to advise you that in the above case the defendants/appellants argue that insofar as the

federal act dealing with electronic surveillance, 18 CSA §§ 2511, 2520, authorizes compensation in a civil action by persons who were the victims of an unlawful interception, the statute would conflict with the First Amendment, and therefore should be interpreted as inapplicable to media defendants and their sources who were not responsible for the interception. Although the case was filed and maintained as a private action, it was only after the case was argued this morning that the Court realized that this interpretation might trench upon its obligation under 28 U.S.C. § 2403(a) to provide you with notice with respect to the constitutional issue.

If you choose to file a brief on the constitutional issue, please have four copies filed in the Office of the Clerk by Tuesday, October 20, 1998. The Court is sending similar notice to the Attorney General of the Commonwealth of Pennsylvania as the Pennsylvania Wiretapping and Electronic Surveillance Control Act is also at issue. After the Court reads the briefs, if any, submitted by the respective Attorney Generals' offices, it will decide whether reargument would be appropriate with the representatives of one or both of the Attorney Generals participating.

If you would like copies of the briefs filed by the parties, please contact the lawyers whose names are listed below:

Donald H. Brobst, Esq.
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Kingston, PA 18704
(717) 288-9751

Very truly yours,
P. DOUGLAS SISK, Clerk

By: /s/ CAROL L. GILLIN
CAROL L. GILLIN,
Calendaring Clerk
Direct Dial: (215) 597-3130

PDS:clg

cc: Donald H. Brobst, Esquire
Frank J. Aritz, Esquire
Raymond P. Wendolowski, Esquire
Jeremiah A. Collins, Esquire (fyi)

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7156

GLORIA BARTNICKI; ANTHONY F. KANE, JR.,
APPELLEES

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS,
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO,
LACKAZERNE, INC., D/B/A WGBI RADIO, APPELLANTS

(Middle District of PA (Scranton)
D.C. Civil No. 94-1201) (EMK)

[Nov. 19, 1998]

Present: SLOVITER, COWEN, *Circuit Judges* and POLLAK, *District Judge*

Motion by United States to intervene as of right for the purpose of defending the constitutionality of 18 U.S.C. Section 2511.

/s/ DEBRA D. WALL
DEBRA D. WALL 597-0485
Case Management Supervisor

Argued 10/5/98

ORDER

The foregoing motion is granted.

By the Court,

/s/ DELORES SLOVITER
Circuit Judge

DATED: DEC 30 1998

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7156

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

v.

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS;
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO;
LACKAZERNE, INC., D/B/A WGBI RADIO, JANE DOE;
JOHN DOE; JACK YOCUM

FREDERICK W. VOPPER, A/K/A FRED WILLIAMS;
KEYMARKET OF NEPA, INC., D/B/A WILK RADIO;
LACKAZERNE, INC., D/B/A WGBI RADIO, JACK YOCUM

APPELLANTS

UNITED STATES OF AMERICA, INTERVENOR

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, and BARRY, *Circuit Judges*, and POLLAK, *District Judge*[1]

---

[1] Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.

The petition for rehearing filed by the Appellees and Amicus Pennsylvania State Education Association and the petition for rehearing filed by Intervenor United States in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing.

By the Court,

/s/ DELORES SLOVITER
Circuit Judge

Dated: FEB 25 2000

APPENDIX I

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 18 U.S.C. 2510 provides in pertinent part:

Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but

such term does not include any electronic communication; * * *

3. 18 U.S.C. 2511 provides in pertinent part:

Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 U.S.C. 2510-2520] any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; * * *

* * *

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then—

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

4. 18 U.S.C. 2515 provides:

Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United

States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

5. 18 U.S.C. 2520 provides:

Recovery of civil damages authorized

(a) IN GENERAL.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) COMPUTATION OF DAMAGES.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal

purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(2) (2)

Nos. 99-1687 and 99-1728

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS;
KEYMARKET OF NEPA, INC., d/b/a WILK RADIO;
LACKAZERNE, INC., d/b/a WGBI RADIO;
JACK YOCUM, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, as applied to the unique facts of this case, the court of appeals' application of the intermediate scrutiny standard of review under the First and Fourteenth Amendments to 18 U.S.C. § 2511(1)(c) & (d) and analogous provisions of Pennsylvania law is consistent with this Court's articulation of that standard.

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IN THE

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Nos. 99-1687 and 99-1728

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, Respondents Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio (together, "Respondents" or the "radio station")[1] re-

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[1] Pursuant to Supreme Court Rule 29.6, Respondents Keymarket of NEPA, Inc., d/b/a WILK Radio and Lackazerne, Inc., d/b/a WGBI Radio state that neither of them has a parent corporation, nor does any publicly held company own ten percent or more of their respective stock.

spectfully supplement Petitioners' Statements of the Case as follows:

This case arises from the interception, recording and dissemination of the contents of a telephone conversation between Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., plaintiffs below. At all relevant times, Kane was employed as a teacher at Wyoming Valley West High School in Luzerne County, Pennsylvania, and also served as president of the local bargaining unit of the Pennsylvania State Education Association ("PEA"), while Bartnicki was an employee of PEA engaged in contract negotiations with the Wyoming Valley West School District on behalf of the district's teachers. App. at 2a, 60a.[2] During their telephone conversation about the gap between the percentage salary increase offered by the school district and that demanded by the union, Kane made the following statement directed to the school district's leadership:

> Kane: If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, because this is, you know, this is bad news.

Id. 3a. A few moments later, Bartnicki and Kane had the following exchange:

> Bartnicki: Well, but now, uh, all rules are off and they'll discuss anything they want.
>
> Kane: Yeh, well if the rules are off, the rules are off for us, too.

[2] Citations to the decisions below are to the Appendix ("App. at") to the Petition for a Writ of Certiorari filed by the United States in No. 99-1728. Citations to the Petitions in No. 99-1687 and No. 99-1728 are denominated as "Plaintiffs' Pet. at" and "U.S. Pet. at," respectively.

> Bartnicki: Exactly.
>
> Kane: The rules are off for us, too. So, if you want to get beat over the head, too, get beat over the head.
>
> Bartnicki: Yes.

Appendix in *Bartnicki v. Vopper*, No. 98-7156 (3d Cir. filed Aug. 3, 1998) ("3d Cir. App.") at 487a.

The identity of the person who intercepted and recorded this conversation is not known. App. at 3a. It is, however, undisputed that an unknown person deposited a tape recording of the conversation, without any markings to identify its origin, in Respondent Jack Yocum's mailbox. *Id.* 3a, 61a. Yocum, the president of an association of concerned taxpayers organized to oppose the union's demands, in turn gave the recording to the radio station, which broadcast it on a public affairs program to listeners in the Northeastern Pennsylvania community affected by a threatened teachers' strike. *Id.* 3a-4a, 60a; *see* 3d Cir. App. at 486a.

In that regard, it is undisputed that negotiations between the union and the school district, and the prospect of a strike by local teachers, had been a "regular subject of the local media." App. at 60a. As the Third Circuit observed:

> The public interest [in] and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance.

Id. 36a-37a.

REASONS FOR DENYING THE WRIT

Petitioners premise their request for review in this Court on three contentions regarding the decision below: that it (1) presents an "important question of constitutional law reserved by this Court in previous decisions;" (2) "strikes down provisions of both a federal and a state statute" and "calls into question the constitutionality of provisions enacted by a majority of the states;" and (3) conflicts with the District of Columbia Circuit's decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000) (No. 99-1709). Plaintiffs' Pet. at 12; *see also* U.S. Pet. at 9, 15-17. None of these contentions is correct. In fact, the decision below constitutes an unremarkable assessment of whether the imposition of civil liability on these Respondents pursuant to 18 U.S.C. § 2511(1)(c) & (d) and 18 Pa. Cons. Stat. Ann. § 5725 (together, the "Wiretapping Acts") survives *intermediate* scrutiny under the First and Fourteenth Amendments. In making this fact-bound assessment, the Third Circuit expressly declined to address the "important question of constitutional law" referenced by Petitioners, "struck down" no provision of either statute, and applied the same standard of First Amendment scrutiny embraced by the majority of the District of Columbia Circuit in *Boehner*.

I. THE "IMPORTANT QUESTION OF CONSTITUTIONAL LAW" URGED ON THIS COURT BY PETITIONERS WAS NOT DECIDED BY THE THIRD CIRCUIT

Petitioners characterize this case as raising an important issue of constitutional law in need of resolution by this Court — specifically, a question they assert this Court reserved in *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989). *See* Plaintiffs' Pet. at 17; U.S. Pet. at 17-18. The decision below, however, is neither predicated upon, nor did the Third Circuit purport to resolve, any such issue.

In *Florida Star*, a newspaper published the name of a rape victim that it had obtained from a report released to the public by the police. 491 U.S. at 526. This Court, adhering to its decision in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star*, 491 U.S. at 541. In footnote 8 of his opinion for the Court, Justice Marshall observed:

> The Daily Mail principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. . . . We have no occasion to address it here.

Id. at 535 n.8.

Bartnicki and Kane argue that this "important question is presented in this case, and [that] this case provides an ideal vehicle to resolve it." Plaintiffs' Pet. at 15-16; *see also id.* at 17 ("[t]his case presents the question thus reserved in *Florida Star*"). The Solicitor General similarly asserts that:

> The court of appeals' decision addresses an important and unresolved issue of constitutional law. This Court has never squarely decided "whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."

U.S. Pet. at 17 (quoting *Florida Star*, 491 U.S. at 535 n.8) (emphasis supplied by government). To the contrary, in the decision below, the Third Circuit not only refused to assess "the constitutionality of the Wiretapping Acts by first determining whether the information disclosed was 'lawfully' or

'unlawfully' obtained," it expressly rejected the suggestion that it determine whether application of those statutes to the disclosure of the Bartnicki-Kane conversation survived strict scrutiny pursuant to the "*Daily Mail* principle." App. at 12a-13a. Indeed, the court of appeals "decline[d] to read *Smith* as controlling here" because, it concluded, this Court had "explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny." *Id.* at 13a (citing *Florida Star*, 491 U.S. at 535 n.8).

Instead, the court of appeals "narrowly circumscrib[ed]" its ruling, App. at 13a, declining either to adopt a "blanket rule" or to resolve "anticipatorily" questions not before it, including the question reserved in *Florida Star*. Rather, the Third Circuit asserted that "'the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'" *Id.* at 14a (quoting *Florida Star*, 491 U.S. at 532-33). In its decision below, therefore, the court of appeals undertook to "resolve the present controversy not by mechanically applying a test gleaned" from cases like *Smith* and *Florida Star*, "but by reviewing First Amendment principles in light of the unique facts and circumstances of this case." App. at 14a.

The record before it led the Third Circuit to subject the civil cause of action asserted here to intermediate scrutiny under the First Amendment, not to a standard of strict scrutiny derived from *Smith*. *Id.* 14a, 28a. That determination was based, not on resolution of the issue "reserved" in *Florida Star*, but rather on the court's conclusion that the Wiretapping Acts' asserted purpose in prohibiting the use and disclosure of unlawfully intercepted communications — *i.e.*, denying the "wrongdoer" who unlawfully intercepts a protected

communication "'the fruits of his labor . . . by eliminating the demand for those fruits by third parties,'" *id.* 28a (quoting United States' brief) — "does not rely on the communicative impact of speech," *id.* Accordingly, the court of appeals held, the Acts are "properly treated as content-neutral" regulations subject to intermediate First Amendment scrutiny. *Id.*[3] Thus, the Third Circuit had no occasion to determine, and did not purport to decide, whether application of strict scrutiny was otherwise rendered inappropriate because the information at issue was allegedly "acquired unlawfully." *Florida Star*, 491 U.S. at 535 n.8.[4] In short, the decision below did not adjudi-

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[3]The court of appeals' conclusion in this regard would, however, appear to be in error. Even content-neutral statutes are subject to strict scrutiny where, as here, they "'unduly constrict the opportunities for free expression.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994) (citation omitted). In *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), for example, the Court subjected to strict scrutiny and invalidated a content-neutral statute that prohibited grand jurors from disclosing their testimony, whatever its content. *See also, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1393 (2000) (plurality opinion) (intermediate scrutiny appropriate because statute was *not* "complete ban on expression"). As construed by Petitioners, the Wiretapping Acts preclude *all* disclosures of the contents of *all* unlawfully intercepted communications.

[4] Even had the court of appeals been inclined to resolve the issue posed in *Florida Star*, it could not properly have done so in a manner that permitted application of the Wiretapping Acts to Respondents. Although the district court assumed, for purposes of summary judgment, that the Bartnicki-Kane conversation had been unlawfully intercepted in the first instance, there is no evidence that the unknown person who placed the recording in Yocum's mailbox had unlawfully intercepted it rather than himself receiving it from a third party. As Respondents argued below, however, even assuming that Yocum received the recording from a third party who had intercepted it unlawfully, this Court's First Amendment jurisprudence would nevertheless require application of the "*Daily Mail* principle" here. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) ("Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the

cate the issue urged on this Court by Petitioners in this case. *See, e.g., Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'") (citation omitted).

II. THE DECISION BELOW CONSTITUTES AN UNREMARKABLE APPLICATION OF INTERMEDIATE FIRST AMENDMENT SCRUTINY TO THE UNIQUE FACTS OF THIS CASE

As the foregoing discussion demonstrates, Petitioners are incorrect when they suggest that the decision below "strikes down provisions of both a federal and a state statute" and "calls into question the constitutionality of provisions enacted by a majority of the states." Plaintiffs' Pet. at 12. Rather, the Third Circuit held only that, under "the unique facts and circumstances of this case," App. at 14a, the imposition of civil liability on these Respondents pursuant to 18 U.S.C. § 2511(1)(c) & (d) and 18 Pa. Cons. Stat. Ann. § 5725 does not survive intermediate scrutiny under the First and Fourteenth Amendments. The court of appeals' formulation of this Court's standard of intermediate scrutiny is both unremarkable and consistent with the constitutional application of the Wiretapping Acts in the run of cases in fact contemplated by the legislature.

Petitioners do not complain that the level of scrutiny adopted by the court of appeals at their urging was incorrect. Moreover, Petitioners do not contend that the Third Circuit misapprehended the scope of review contemplated by the intermediate scrutiny doctrine. As the court of appeals correctly noted, intermediate scrutiny "encompasses some balancing of the state interest and the means used to effectuate

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hands of the press, unless the need for secrecy is manifestly overwhelming.").

that interest." App. at 29a. The decision below reflects the Third Circuit's recognition that intermediate scrutiny contemplates an examination of, *inter alia*, "whether the regulation is 'narrowly tailored to serve a significant governmental interest,'" *id.* 30a (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)), and whether the burden that the regulation places on speech is "'substantially broader than necessary'" to vindicate that interest, App. at 41a-42a (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). *See also, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1397 (2000) (describing relevant element of intermediate scrutiny as requirement "that the restriction [be] no greater than is essential to the furtherance of the government interest"); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) (describing relevant element of intermediate scrutiny as requirement that regulation not "'"burden substantially more speech than is necessary to further"'" government interest) (citations omitted). Thus, the court of appeals limited its inquiry to whether "the government has shown that its proffered interest is sufficiently furthered by application *to these defendants* of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake." App. at 32a (emphasis added).[5]

At bottom, therefore, Petitioners' request for review in this Court rests on their disagreement with the manner in which

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[5] In dissent in the court of appeals, Judge Pollak emphasized his agreement with the majority's formulation of the constitutional principles governing its decision; he parted company with the majority only in the manner in which it applied that principle to the facts of the case. *See* App. at 45a (Pollak, J., dissenting) ("I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's *ultimate application* of its analysis to the case at bar.") (emphasis added); *see also id.* 46a-47a (same).

the Third Circuit applied this Court's intermediate scrutiny standard to the facts of this case. The limited scope of the decision below is further reflected in the court of appeals' statement of the issue it actually decided:

> [W]hether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

Id. 2a.

In this fact-specific context — involving the "disclosure" of information of significant public concern to citizens of a local community by persons who played no role of any kind in an interception in violation of the Wiretapping Acts — the Third Circuit rejected the government's contention that, as applied in this case, "the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." *Id.* 33a. The court correctly recognized that the government had "offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation." *Id.* Under these circumstances, the Third Circuit concluded, application of the Wiretapping Acts to Respondents burdened more speech than necessary since "the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* 35a. In so holding, the court of appeals expressly disclaimed any intent that its ruling apply beyond the specific circumstances presented — *i.e.*, circumstances in which the Wiretapping Acts are applied to punish those who disclose information about matters of public con-

cern and "who neither encouraged nor participated directly or indirectly in the interception, an application *rarely* attempted." *Id.* 39a (emphasis added). As construed by the court of appeals, therefore, the statutes — including the private damages remedies at issue here — remain in full force and effect in all other circumstances.

The court of appeals' application of intermediate scrutiny in this narrow context accords with this Court's First Amendment jurisprudence. Simply put, the government has failed to provide any support, from the federal Wiretapping Act's legislative history or otherwise, for its contention that the statutory prohibition on disclosure of an intercepted communication, as applied to disclosure of a newsworthy matter of significant public concern by an innocent recipient of the communication, is narrowly tailored to effectuate the Act's preclusion of illegal interception in the first instance. *Id.* 33a.[6] As this Court has marked the contours of intermedi-

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[6] The Solicitor General attempts to find support for the proposition that effective deterrence of illegal interception of telephone conversations requires application of a prohibition on disclosure to those, like Respondents here, who did no more than disclose to the public the newsworthy contents of such a conversation, in the Senate Report's passing observation that "'[o]nly by striking at all aspects of the problem can privacy be adequately protected.'" U.S. Pet. at 15 (quoting S. REP. NO. 1097, 90th Cong., 2d Sess. (1968) ("1968 Senate Rep.") at 69). The quoted passage, however, reflects a focus by Congress not on one who disseminates information, but rather on an entirely different player in the interception process:

> It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture and advertising *of intercepting devices*. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected.

1968 Senate Rep. at 39 (emphasis added). The legislative history contains no indication that Congress was concerned with the type of newsworthy disclosure at issue here; to the contrary, to the extent it addressed the use

ate scrutiny, the Third Circuit could not properly have reached a different conclusion on the facts of this case:[7] "'[w]hen the government defends a regulation on speech . . . .[i]t must demonstrate that . . . *the regulation will in fact alleviate these harms in a direct and material way.*'" App. at 34a n.5 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995)) (emphasis supplied by court of appeals); *accord 44 Liquormart, Inc. v.*

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and disclosure provisions at all, its attention was focused on the protection of confidential information such as trade secrets and other proprietary business information that do not constitute matters of public concern, as well as truly private affairs such as marital and similar deeply personal communications. *See id.* at 37.

[7] The Solicitor General asserts that the legislative purpose in prohibiting the use and disclosure of intercepted communications can be analogized to the deterrent effect of statutes that sanction the possession of child pornography or that prohibit the receipt of stolen property. *See* U.S. Pet. at 13. Such analogies are, however, faulty. Reliance by Petitioners on *Osborne v. Ohio*, 495 U.S. 103 (1990), and *New York v. Ferber*, 458 U.S. 747 (1982), *see* U.S. Pet. at 13 & n.7, is misplaced because the statutes at issue in those cases regulated child pornography, a category of speech that, unlike that of Respondents here, is not entitled to protection under the First Amendment. The government's analogy to statutes criminalizing the receipt of stolen goods overlooks both the constitutional distinction between wholly unprotected conduct and the protected speech of Respondents here, as well as the fact that, because money drives the market for stolen goods, eliminating the buyer will of necessity have a *direct* impact on the seller in that context. In this case, whatever may have been the motive of the interceptor of the Bartnicki-Kane conversation, it was not to sell the tape recording. Moreover, the judgment below does not disturb the applicability of the Wiretapping Acts to circumstances—such as industrial espionage or insider trading—in which money provides a financial incentive for disclosure. Nor does it prevent application of the Acts to the disclosure of purely private communications unrelated to matters of public concern such as those, referenced by Congress, between spouses about their marriage, or between patients and their doctors. *See* 1968 Senate Rep. at 37; S. REP. NO. 541, 99th Cong., 2d Sess. (1986) at 185.

Rhode Island, 517 U.S. 484, 505 (1996) (while "common sense supports the conclusion" that prohibition against price advertising of alcohol would lead to increase in prices and lower demand, "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *City of Erie v. Pap's A.M.*, 120 S. Ct. at 1404 (Souter, J., concurring in part, dissenting in part) (concluding that the "upshot" of Court's precedents "is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (burden of justifying restriction on commercial speech "is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981) (zoning ordinance banning live entertainment failed heightened scrutiny where petitioners presented no evidence, and court did not "find it self-evident," that live entertainment would cause problems with parking, trash, police protection, and medical facilities).

Finally, the Solicitor General's contention that the Wiretapping Acts, as applied here, burden no more speech than "[]necessary" or "'essential'" to achieve the asserted content-neutral statutory purpose, U.S. Pet. at 12, 13 (citation omitted), is doubly flawed.[8] First, the legislative history not only

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[8] To the extent that the government maintains that an additional justification for enforcing the Wiretapping Acts against Respondents is that prohibiting disclosure prevents further injury flowing from the initial unlawful interception, it has no proper application under the circumstances of this case. The public disclosure of a conversation between two

fails to articulate any basis for the government's contention in this regard, it cannot reasonably be squared with Congress' decision to limit to a fine the criminal penalties to be imposed on those who, in circumstances such as are presented by this case, in fact intercept protected communications. *See* 18 U.S.C. § 2511(4)(b)(ii); *see also Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street."). Enhancement of those criminal penalties to include at least the prospect of incarceration would, it can reasonably be presumed, have a more direct effect on illegal interceptions than the indirect prohibition on disclosure at issue here. *See, e.g., Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *4 (D.D.C. July 28, 1998) (deterrent value of $500 fine imposed on interceptors in that case was "almost laughable"), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000) (No. 99-1709).

Second, by imposing liability on those who have "reason to know" that a disclosed communication involving a matter of public concern was unlawfully intercepted, the statutes are

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union officials in which they seriously contemplate acts of violence against public officials, *see* App. at 36a-37a, in no sense gives rise to the kind of injury Congress sought to redress. Indeed, Bartnicki and Kane have expressly stipulated that they do not seek to recover damages for actual injury caused by the public disclosure of their conversation. *See* 3d Cir. App. at 358a (statement of material facts not in dispute); *see also id.* 329a (Bartnicki's cellular telephone contract reflects her recognition that such calls could be intercepted and overheard). Finally, as the Third Circuit correctly noted, any argument that Bartnicki and Kane are entitled to damages attributed to the "publicity" given by Respondents to their scheme—which concededly constitutes a matter of significant public concern—would rightly be subject to strict scrutiny. *See* App. at 27a. *Cf. Jenkins v. Bolla*, 600 A.2d 1293, 1296 (Pa. Super. Ct. 1992) (no cause of action for publication of private facts where information disclosed relates to matter of public concern).

demonstrably overbroad, reaching — as the Petitioners contend they do here — persons whose only "reason to know" of an unlawful interception derives from the unadorned fact that a recording exists. *See* App. at 10a ("'a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception'") (quoting district court); *id.* 56a (Pollak, J., dissenting) ("reason to know" standard poses "substantial First Amendment difficulty"). Under the "reason to know" standard, any person who heard the recording at issue on the radio and then disclosed a portion of its contents across the dinner table would have as much "reason to know" it had been intercepted unlawfully as did Respondents here. "Not only is this not narrow tailoring, this is not tailoring of any sort." *Boehner*, 191 F.3d at 485 (Sentelle, J., dissenting); *see also id.* ("I do not see how we can draw a line today that would punish [the defendant source] and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information . . . and published it again.").

In the last analysis, the "principal difference[]" between Petitioners and the court of appeals "lies in the weight [they assign] the factors to be balanced" in the application of intermediate scrutiny to the facts of this case. App. at 37a. "A petition for a writ of certiorari," however, "is rarely granted when the asserted error consists," as it does here, of an alleged "misapplication of a properly stated rule of law." S. Ct. Rule 10.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *BOEHNER v. McDERMOTT*

Finally, Petitioners contend that the decision below conflicts with that of the District of Columbia Circuit in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), a case the So-

licitor General describes as "virtually identical" to this one. U.S. Pet. at 15-16; *see also* Plaintiffs' Pet. at 13 ("[t]he conflict between the Third Circuit's decision in this case and the D.C. Circuit's decision in *Boehner* is clear and inescapable"). An examination of the decisions, however, reveals (i) that the two courts each applied the same constitutional principle in an appropriately fact-specific, narrow manner, and (ii) that the result in each is properly attributed to the unique facts at issue.

In *Boehner*, the D.C. Circuit, like the Third Circuit here, determined that application of 18 U.S.C. § 2511(1)(c) & (d) should be subjected to intermediate scrutiny. *See Boehner*, 191 F.3d at 467 (Randolph, J.); *id.* at 479 (Ginsburg, J.). In separate opinions, Judges Randolph and Ginsburg applied that standard to the facts before them, expressly limiting the scope of their ruling to that specific context. *See id.* at 478 (Randolph, J.) (statutes "are not unconstitutional *as applied in this case*") (emphasis added); *id.* at 478-79 (Ginsburg, J.) (emphasizing limited reach of holding and concluding that federal Wiretapping Act "is not unconstitutional *as applied in this case*") (emphasis added); *see also* App. at 45 n.2 (Pollak, J., dissenting) (court in *Boehner* "was at pains to point out the limited scope of its ruling"). Indeed, as Judge Randolph emphasized:

> McDermott's challenge is only to the statute as it applies to his delivery of the tape to the newspapers. Whether a different analysis would govern if, for instance, McDermott . . . read[] a transcript of the tape in a news conference, is therefore a question not presented here. Nor should we be concerned with whether [the Wiretapping Acts] would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone.

191 F.3d at 467 (Randolph, J.); *see also id.* at 477-78 ("Whether the statute would be constitutional as applied to a newspaper who published excerpts from the tape — who, in other words, engaged in speech — thus raises issues not before us.").

Thus, the D.C. Circuit concluded only that, *as applied against McDermott*, the statute withstood intermediate scrutiny. Specifically, in view of what Judges Randolph and Ginsburg described as McDermott's role in the illegal "transaction" that resulted in publication of the conversation by others, the court determined that the government's interest in protecting the privacy of such conversations would be furthered by subjecting McDermott to civil liability. *See id.* at 478. Moreover, the court concluded, the burden on First Amendment interests under such circumstances was "'no greater than is essential to the furtherance of that interest.'" *Id.* at 470 (citation omitted).

The D.C. Circuit's decision in *Boehner* is, therefore, self-evidently a product of the unique facts of that case. Those facts, in turn, are properly distinguished from those at issue here in a manner that determined the outcome of the court's application of the intermediate scrutiny standard in *Boehner*. In that case, it was undisputed that the original interception was unlawful. John and Alice Martin, who are alleged to have deliberately followed Representative Boehner's automobile for that purpose, *see Boehner v. McDermott*, 1998 WL 436897, at *1, "used a radio scanner to eavesdrop on the conversation" between Boehner and his colleagues, which they then recorded, *Boehner*, 191 F.3d at 465. The Martins "publicly confessed" their role and ultimately pleaded guilty to criminal charges brought against them. *Id.*[9] Moreover, they

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[9] As Judge Randolph recognized in *Boehner*, the fact that McDermott knew who his source was and that his source had acquired the recording unlawfully distinguishes *Boehner* from *Landmark Communications, Inc. v. Virginia*, 435 U.S. at 838, in which the record "contained no evidence

"personally delivered the tape to Representative McDermott" under cover of a letter explaining that "the tape contained 'a conference call heard over a scanner.'" *Id.* As reflected in the same letter, the Martins apparently had entered into an agreement to the effect that McDermott "would arrange for them to receive immunity from criminal prosecution" in return for delivery of the tape. *Boehner v. McDermott*, 1998 WL 436897, at *1.

Thus, as the facts were presented to the D.C. Circuit in the context of McDermott's motion to dismiss, he had notice at the time he received the tape both that its acquisition had, in fact, been illegal, and that the Martins expected something of value in return for providing the cassette to him. These facts led Judge Randolph to conclude that McDermott had gained access to the recording through actual participation in an illegal transaction:

> [T]hroughout this litigation, McDermott has attempted to portray himself as an innocent. Again and again he insists that he "lawfully obtained" the tape recording from the Martins. By this he means that he broke no law in taking possession of the tape. But this is hardly certain. The Martins violated [the federal Wiretapping Act] not once, but twice — first when they intercepted the

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regarding who supplied the newspaper with the information [regarding a pending investigation of a state judge, dissemination of which was prohibited] or how they obtained it." *Boehner*, 191 F.3d at 474-75 (Randolph, J.). The record below, in contrast, like that in *Landmark*, reveals nothing about the origin of the recording at issue here. The facts of *Boehner*, like those at issue in *Peavy v. Harman*, 37 F. Supp. 2d 495 (N.D. Tex. 1999), *appeal pending*, No. 99-10272 (5th Cir. argued Apr. 3, 2000) (plaintiffs' conversation intercepted by defendant neighbor who made recordings available to defendant media), also effectively rebut the government's contention that, in the context of disclosures of newsworthy information involving matters of public concern, the interception itself is—as in the case of industrial espionage that Congress had in mind—"'typically a clandestine crime.'" U.S. Pet. at 3 (quoting 1968 Senate Rep. at 96).

> call and second when they disclosed it to McDermott. By accepting the tape from the Martins, McDermott participated in their illegal conduct. That transaction may have involved a quid pro quo. When they transmitted the tape to McDermott, the Martins expressed their understanding that they would be receiving immunity for their illegal conduct. The inference is that someone promised this in return for the tape. Who? The obvious candidate is McDermott, or someone acting in concert with him. . . . It is enough to point out, as Boehner does, that in receiving the tape, McDermott took part in an illegal transaction.

Boehner, 191 F.3d at 475-76 (Randolph, J.). Judge Ginsburg, whose concurrence in the judgment produced the result in *Boehner*, likewise concluded that "McDermott knew the transaction [by which he acquired the tape from the Martins] was illegal at the time he entered into it," and, as a consequence, he could not be said to have lawfully acquired it. *Id.* at 479 (Ginsburg, J.).[10] As Judge Randolph emphasized, "[t]he link between the Martins and McDermott was direct. Whether someone further down the chain would have a defense . . . that the taint of illegality was sufficiently dissipated . . . is something we do not decide." *Id.* at 469 n.7 (citation omitted).

In this case, in contrast, the record "is *devoid* of any allegation that the defendants" — *including Yocum* — "encouraged or participated in the interception in a way that would justify characterizing them as 'wrongdoers.'" App. at 33a (emphasis added). As the Third Circuit explained, "Yocum has not been

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[10] Judge Sentelle, in dissent in *Boehner*, was equally explicit on this point: McDermott "willfully dealt with felons and knowingly received unlawfully obtained evidence on the chance that he might be able to use something contained therein to embarrass one of the colleagues whose ethics he was charged with policing." 191 F.3d at 481 (Sentelle, J., dissenting).

shown to have 'entered into' any transaction with the interceptors," *id.* 40a-41a, nor is there any dispute that Yocum simply discovered the cassette in his mailbox, and does not know who put it there, *see id.* 61a. There was no evidence presented in opposition to his motion for summary judgment that Yocum made any agreement with the interceptor or that he solicited a copy of the recording.[11] Thus, the Solicitor General's suggestion that the two "courts of appeals have reached different conclusions regarding the constitutionality of the application of an Act of Congress to *materially indistinguishable facts*," U.S. Pet. at 17 (emphasis added), is incorrect.

As this Court has emphasized in articulating the considerations governing review on *certiorari*, a petition will be granted only for "compelling reasons," including a conflict between two courts of appeals "on the same important matter." S. Ct. Rule 10(a). While the reasoning of the various judges in this case and in *Boehner* concededly differs in certain respects, both courts subjected the challenged statutes to intermediate scrutiny and, based on the unique facts before them, reached discrete conclusions with respect to the constitutionality of applying them in the circumstances presented. Indeed, there is no reason to believe that either court would have reached a conclusion different from that of its sister circuit if presented with the facts of the other case. It bears emphasis in this regard that both courts expressly paid close heed to the admonition of this Court

> "that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amend-

[11] Accordingly, the argument that any "taint of illegality" was sufficiently dissipated by the time the recording reached the news media's source—a question that the court in *Boehner* expressly recognized was not before it, 191 F.3d at 469 n.7—*was* squarely presented in this case.

> ment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

App. at 14a (quoting *Florida Star v. B.J.F.*, 491 U.S. at 532-33) (citations omitted); *see also Boehner*, 191 F.3d at 471 (Randolph, J.) (same). The fealty of the courts of appeals to this requirement fairly precludes the suggestion that their limited decisions, rendered on materially different records, are in conflict in any constitutionally meaningful sense.[12]

[12] Even were the D.C. and Third Circuits' respective applications of the intermediate scrutiny standard deemed to present a "'true'" conflict, "'the impact of the conflict is narrowly confined and is not apt to have continuing future consequences.'" John Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 112 (1959), *quoted in* ROBERT L. STERN *et al.*, SUPREME COURT PRACTICE (7th ed. 1993) ("SUPREME COURT PRACTICE") at 169; *see also* William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1982) (noting Court's "'policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question'"), *quoted in* SUPREME COURT PRACTICE at 171.

CONCLUSION

For the foregoing reasons, Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio respectfully request that the Petitions for Writs of Certiorari be denied.

Respectfully submitted,

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(3) (3)

Nos. 99-1687 and 99-1728

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

FREDERICK W. VOPPER, et al.,

Respondents.

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,

Petitioners,

vs.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS;
KEY MARKET OF NEPA, INC., d/b/a WILK RADIO;
LACKAZERNE, INC., d/b/a WGBI RADIO;
JACK YOCUM, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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12 PP

QUESTION PRESENTED

Does the First Amendment preclude imposition of Civil Damages for disclosure of a tape recording of an intercepted telephone conversation which contains information of a newsworthy nature and contains threats of violence when the Defendants, consisting of two radio stations, a radio personality and an individual, who received the tape recording anonymously and furnished the tape recording to the media defendants, played no direct or indirect roll in the interception.

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Jack Yocum, an adult individual, was the president of the Wyoming Valley West Taxpayers Association, an organization which was opposed to the Teachers Union Bargaining Proposals with the Wyoming Valley West School District. The Petitioners, Gloria Bartnicki and Anthony F. Kane, Jr. ("Bartnicki and Kane"), were actively involved in the negotiation of the new Wyoming Valley West Teacher's contract. Anthony F. Kane, Jr., a teacher at the Wyoming Valley West High School, was president of the Union and Gloria Bartnicki was employed by the Pennsylvania State Education Association (PSEA), the teacher's union, which provided support services and assistance to PSEA affiliates representing personnel at various public school districts.

In May of 1993, a conversation occurred between Bartnicki and Kane. It is alleged that Kane was speaking on a conventional telephone while Bartnicki was in her car using a cellular telephone. During their conversation, Kane stated:

> "If they're not going to move for three percent, we're gonna have to go to their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, 'we'll meet and discuss this.' You don't discuss the items in public." (U.S. Pet. Appendix at 3a)

Kane was referring to members of the school board who he had felt had been negotiating in the paper by telling reporters what the Board's position was relative to a pay increase for the teachers.

The conversation was somehow intercepted and recorded onto a tape, which was given to Jack Yocum, anonymously, by someone or some others who had placed it in his mailbox. (U.S. Pet. Appendix at 3a) Yocum had listened to the tape and, and shortly thereafter, concerned with the bomb threats made thereon, gave a copy of the tape to the Respondent, Frederick W. Vopper, a/k/a Fred Williams, who kept the tape. However, the tape was not played until some four months later when, on or about September 30, 1993, Frederick W. Vopper played the tape in its entirety on his talk show carried by radio station WILK and WGBI. Although other news media outlets had either aired part of the tape or had published transcripts of same, these media outlets were not named as defendants in a civil suit subsequently brought by Kane and Bartnicki v. Yocum, Fred Vopper, WILK, WGBI, and their parent companies, Keymarket of Nepa, Inc. and Lakazerne, Inc. (U.S. Pet. Appendix at 4a)

Though extensive discovery had been taken after institution of the law suits, it was never determined who intercepted the tape, how same was intercepted or for what purpose it was intercepted. No one disputes the fact that Jack Yocum received the tape anonymously in his mailbox and did not take part in the interception or taping of the conversation.

Kane and Bartnicki brought law suits under both the Federal and State Statutes regulating wire tapping. The

Federal Statute located at 18 U.S.C. §§ 2511 *et seq.* and the Pennsylvania Statute located at 18 Pa. C.S.A. §§ 5703 *et seq.* ("wiretap statutes") both provide for criminal and civil liabilities for the interception, disclosure, and publication of wire, oral or electronic communications.

The Federal District Court for the Middle District of Pennsylvania, after the close of Pleadings and Discovery, denied Summary Judgment to all parties. Further, the District Court denied Summary Judgment after reconsideration. The District Court then certified two (2) questions for Appeal pursuant to 28 U.S.C. § 1292(b). Those questions were: (1) whether the imposition of liability on the media Defendants under the wiretapping statutes solely for broadcasting the newsworthy tape . . . , when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants violates the First Amendment; and (2) whether imposition of liability under the aforesaid wiretapping statutes on Defendant, Jack Yocum, solely for providing the anonymously intercepted and recorded tape to the media Defendant violates the First Amendment. (Bartnicki and Kane Pet. at 9) After oral argument and after the United States ("Government") was granted the right to intervene and the PSEA was granted leave to file an Amicus Curiae Brief, the Third Circuit on a two to one vote reversed the District Court's Order denying Summary Judgment to the Defendants.

After Motions for rehearing and suggested rehearing en banc, by Bartnicki and Kane and by the Government were denied, the instant petitions for Writ of Certiorari

were filed on behalf of Bartnicki and Kane and the Government.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision below does not conflict with a recent decision of the District of Columbia Circuit, does not strike down provisions of both a federal and state statute and does not incorrectly decide important question of constitutional law reserved by this Court in previous decisions.

A. The decision below does not conflict with the decision of the District of Columbia Circuit in *Boehner v. McDermott*. Petitioners would have the Court believe that the facts in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) are indistinguishable from the facts in the instant case.

There are marked differences in the cases. In the *Boehner* case, Representative James McDermott, although he had not participated in the interception of any communications, accepted a tape from a couple, the Martins, who had intentionally intercepted a conference call in which Representative John Boehner participated via a cellular telephone. In that call, then Speaker of the House, Newt Gingrich engaged in conduct alleged to have violated an agreement he had recently made with the House Ethics Committee. The Martins taped the call and delivered same to McDermott. McDermott was then a ranking democratic member of the Ethics Committee. McDermott accepted the tape from these individuals knowing they had illegally intercepted the call. McDermott used the

tape for for his own political gain by giving a copy to the New York Times. Additionally, McDermott sought immunity for the Martins from criminal prosecution for intercepting the tape. Representative Boehner sued McDermott, but did not sue the New York Times. McDermott, as the Third Circuit correctly recognized, knew his participation was illegal when he entered into it. (U.S. Pet. Appendix at 40a quoting decision in *Boehner v. McDermott*, 191 F.3d at 479). In the case at bar, Yocum was not in the same position as McDermott. Yocum was an innocent conduit when he received the recorded tape. (U.S. Pet. Appendix at 40a-41a). Additionally, the heightened public interest and the newsworthiness of the conversation between Kane and Bartnicki are obvious. (U.S. Pet. Appendix at 37a). The Third Circuit recognized this in its decision. Additionally, there were threats of acts of violence contained on the tape and the Third Circuit recognized that nothing in the context of the conversation suggested that it was said in anything other than a serious vein. (U.S. Pet. Appendix at 36a). In addition, the fact that the President of the School Teacher's Union would make this suggestion was considered by the Third Circuit to be highly newsworthy and of public significance. (U.S. Pet. Appendix at 36a-37a). Additionally, the D. C. Circuit clearly indicated that its decision was based on the facts of that case only and limited in scope. (191 F.3d at 478) (U.S. Pet. Appendix at 43a-45a, footnotes 1 & 2).

B. The decision below does not strike down important provisions of a Federal Statute and does not call into question the constitutionality of Statutes enacted by a majority of the states. The Third Circuit decision in this

case does not invalidate the subject statutes. Wiretapping still is punishable both civilly and criminally. The Third Circuit decision in this case is limited to the unique facts and questions presented to the Court. It does not have the far-reaching and broad effect that the Petitioners would like the Court to believe. The question answered by the Third Circuit is a very narrow one and the Court's analysis of this case is in keeping with the approach stated by the Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), in that the Third Circuit's decision is limited to the unique facts and circumstances of this case.

C. The decision below does not decide incorrectly an important question of constitutional law that has been reserved by this Court in previous decisions. The Third Circuit correctly analyzed the decisions of the United States Supreme Court in four (4) cases where this Court had concluded that State attempts to punish or deter the Press's publication of truthful information was unconstitutional. These cases all involve the balancing of privacy interests against First Amendment rights. In each case, the Court came down on the side of the First Amendment. Both Petitioners refer to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In each of these cases, the Court held in favor of the First Amendment (Government Pet. Appendix, at 12a-13a).

The Third Circuit correctly adopted the position previously taken by the Supreme Court in cases of this nature, in that, the Court will apply First Amendment principles to the unique facts and circumstances of the

case. (U.S. Pet. Appendix at 14a). As the Supreme Court stated in *Florida Star*,

> "we continue to believe that the sensitivity and significance of the interest presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." (U.S. Pet. Appendix at 14a).

The Petitioners in this case would like the Court to think that the decision of the Third Circuit is far broader than it really is. In point of fact, the Third Circuit followed the Supreme Court's approach to deciding cases of this nature by restricting its decision to the facts and circumstances of the case at bar. Therefore, the Petitioner's argument that the Third Circuit decision decides incorrectly an important question of Constitutional Law that has been reserved by the Supreme Court in previous decisions is incorrect.

The two wiretap statutes in question will still effectively protect people from the interception and improper publication of their conversations. The Third Circuit's decision will not render the subject statutes inapplicable or inoperative.

CONCLUSION

The Petitions for a Writ of Certiorari by United States of America and Gloria Bartnicki and Anthony F. Kane, Jr. should be denied.

Respectfully submitted,

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Nos. 99-1687 and 99-1728

IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS;
KEYMARKET OF NEPA, INC., d/b/a WILK RADIO;
LACKAZERNE, INC., d/b/a WGBI RADIO;
JACK YOCUM, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, as applied to the unique facts of this case, the court of appeals' application of the intermediate scrutiny standard of review under the First and Fourteenth Amendments to 18 U.S.C. § 2511(1)(c) & (d) and analogous provisions of Pennsylvania law is consistent with this Court's articulation of that standard.

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IN THE

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GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, Respondents Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio (together, "Respondents" or the "radio station")[1] re-

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[1] Pursuant to Supreme Court Rule 29.6, Respondents Keymarket of NEPA, Inc., d/b/a WILK Radio and Lackazerne, Inc., d/b/a WGBI Radio state that neither of them has a parent corporation, nor does any publicly held company own ten percent or more of their respective stock.

spectfully supplement Petitioners' Statements of the Case as follows:

This case arises from the interception, recording and dissemination of the contents of a telephone conversation between Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., plaintiffs below. At all relevant times, Kane was employed as a teacher at Wyoming Valley West High School in Luzerne County, Pennsylvania, and also served as president of the local bargaining unit of the Pennsylvania State Education Association ("PEA"), while Bartnicki was an employee of PEA engaged in contract negotiations with the Wyoming Valley West School District on behalf of the district's teachers. App. at 2a, 60a.[2] During their telephone conversation about the gap between the percentage salary increase offered by the school district and that demanded by the union, Kane made the following statement directed to the school district's leadership:

> Kane: If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, because this is, you know, this is bad news.

Id. 3a. A few moments later, Bartnicki and Kane had the following exchange:

> Bartnicki: Well, but now, uh, all rules are off and they'll discuss anything they want.
>
> Kane: Yeh, well if the rules are off, the rules are off for us, too.

[2] Citations to the decisions below are to the Appendix ("App. at") to the Petition for a Writ of Certiorari filed by the United States in No. 99-1728. Citations to the Petitions in No. 99-1687 and No. 99-1728 are denominated as "Plaintiffs' Pet. at" and "U.S. Pet. at," respectively.

> Bartnicki: Exactly.
>
> Kane: The rules are off for us, too. So, if you want to get beat over the head, too, get beat over the head.
>
> Bartnicki: Yes.

Appendix in *Bartnicki v. Vopper*, No. 98-7156 (3d Cir. filed Aug. 3, 1998) ("3d Cir. App.") at 487a.

The identity of the person who intercepted and recorded this conversation is not known. App. at 3a. It is, however, undisputed that an unknown person deposited a tape recording of the conversation, without any markings to identify its origin, in Respondent Jack Yocum's mailbox. *Id.* 3a, 61a. Yocum, the president of an association of concerned taxpayers organized to oppose the union's demands, in turn gave the recording to the radio station, which broadcast it on a public affairs program to listeners in the Northeastern Pennsylvania community affected by a threatened teachers' strike. *Id.* 3a-4a, 60a; *see* 3d Cir. App. at 486a.

In that regard, it is undisputed that negotiations between the union and the school district, and the prospect of a strike by local teachers, had been a "regular subject of the local media." App. at 60a. As the Third Circuit observed:

> The public interest [in] and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance.

Id. 36a-37a.

REASONS FOR DENYING THE WRIT

Petitioners premise their request for review in this Court on three contentions regarding the decision below: that it (1) presents an "important question of constitutional law reserved by this Court in previous decisions;" (2) "strikes down provisions of both a federal and a state statute" and "calls into question the constitutionality of provisions enacted by a majority of the states;" and (3) conflicts with the District of Columbia Circuit's decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000) (No. 99-1709). Plaintiffs' Pet. at 12; *see also* U.S. Pet. at 9, 15-17. None of these contentions is correct. In fact, the decision below constitutes an unremarkable assessment of whether the imposition of civil liability on these Respondents pursuant to 18 U.S.C. § 2511(1)(c) & (d) and 18 Pa. Cons. Stat. Ann. § 5725 (together, the "Wiretapping Acts") survives *intermediate* scrutiny under the First and Fourteenth Amendments. In making this fact-bound assessment, the Third Circuit expressly declined to address the "important question of constitutional law" referenced by Petitioners, "struck down" no provision of either statute, and applied the same standard of First Amendment scrutiny embraced by the majority of the District of Columbia Circuit in *Boehner*.

I. THE "IMPORTANT QUESTION OF CONSTITUTIONAL LAW" URGED ON THIS COURT BY PETITIONERS WAS NOT DECIDED BY THE THIRD CIRCUIT

Petitioners characterize this case as raising an important issue of constitutional law in need of resolution by this Court — specifically, a question they assert this Court reserved in *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989). *See* Plaintiffs' Pet. at 17; U.S. Pet. at 17-18. The decision below, however, is neither predicated upon, nor did the Third Circuit purport to resolve, any such issue.

In *Florida Star*, a newspaper published the name of a rape victim that it had obtained from a report released to the public by the police. 491 U.S. at 526. This Court, adhering to its decision in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star*, 491 U.S. at 541. In footnote 8 of his opinion for the Court, Justice Marshall observed:

> The Daily Mail principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. . . . We have no occasion to address it here.

Id. at 535 n.8.

Bartnicki and Kane argue that this "important question is presented in this case, and [that] this case provides an ideal vehicle to resolve it." Plaintiffs' Pet. at 15-16; *see also id.* at 17 ("[t]his case presents the question thus reserved in *Florida Star*"). The Solicitor General similarly asserts that:

> The court of appeals' decision addresses an important and unresolved issue of constitutional law. This Court has never squarely decided "whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."

U.S. Pet. at 17 (quoting *Florida Star*, 491 U.S. at 535 n.8) (emphasis supplied by government). To the contrary, in the decision below, the Third Circuit not only refused to assess "the constitutionality of the Wiretapping Acts by first determining whether the information disclosed was 'lawfully' or

'unlawfully' obtained," it expressly rejected the suggestion that it determine whether application of those statutes to the disclosure of the Bartnicki-Kane conversation survived strict scrutiny pursuant to the "*Daily Mail* principle." App. at 12a-13a. Indeed, the court of appeals "decline[d] to read *Smith* as controlling here" because, it concluded, this Court had "explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny." *Id.* at 13a (citing *Florida Star*, 491 U.S. at 535 n.8).

Instead, the court of appeals "narrowly circumscrib[ed]" its ruling, App. at 13a, declining either to adopt a "blanket rule" or to resolve "anticipatorily" questions not before it, including the question reserved in *Florida Star*. Rather, the Third Circuit asserted that "'the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'" *Id.* at 14a (quoting *Florida Star*, 491 U.S. at 532-33). In its decision below, therefore, the court of appeals undertook to "resolve the present controversy not by mechanically applying a test gleaned" from cases like *Smith* and *Florida Star*, "but by reviewing First Amendment principles in light of the unique facts and circumstances of this case." App. at 14a.

The record before it led the Third Circuit to subject the civil cause of action asserted here to intermediate scrutiny under the First Amendment, not to a standard of strict scrutiny derived from *Smith*. *Id.* 14a, 28a. That determination was based, not on resolution of the issue "reserved" in *Florida Star*, but rather on the court's conclusion that the Wiretapping Acts' asserted purpose in prohibiting the use and disclosure of unlawfully intercepted communications — *i.e.*, denying the "wrongdoer" who unlawfully intercepts a protected

communication "'the fruits of his labor . . . by eliminating the demand for those fruits by third parties,'" *id.* 28a (quoting United States' brief) — "does not rely on the communicative impact of speech," *id.* Accordingly, the court of appeals held, the Acts are "properly treated as content-neutral" regulations subject to intermediate First Amendment scrutiny. *Id.*[3] Thus, the Third Circuit had no occasion to determine, and did not purport to decide, whether application of strict scrutiny was otherwise rendered inappropriate because the information at issue was allegedly "acquired unlawfully." *Florida Star*, 491 U.S. at 535 n.8.[4] In short, the decision below did not adjudi-

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[3]The court of appeals' conclusion in this regard would, however, appear to be in error. Even content-neutral statutes are subject to strict scrutiny where, as here, they "'unduly constrict the opportunities for free expression.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994) (citation omitted). In *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), for example, the Court subjected to strict scrutiny and invalidated a content-neutral statute that prohibited grand jurors from disclosing their testimony, whatever its content. *See also, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1393 (2000) (plurality opinion) (intermediate scrutiny appropriate because statute was *not* "complete ban on expression"). As construed by Petitioners, the Wiretapping Acts preclude *all* disclosures of the contents of *all* unlawfully intercepted communications.

[4] Even had the court of appeals been inclined to resolve the issue posed in *Florida Star*, it could not properly have done so in a manner that permitted application of the Wiretapping Acts to Respondents. Although the district court assumed, for purposes of summary judgment, that the Bartnicki-Kane conversation had been unlawfully intercepted in the first instance, there is no evidence that the unknown person who placed the recording in Yocum's mailbox had unlawfully intercepted it rather than himself receiving it from a third party. As Respondents argued below, however, even assuming that Yocum received the recording from a third party who had intercepted it unlawfully, this Court's First Amendment jurisprudence would nevertheless require application of the "*Daily Mail* principle" here. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) ("Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the

cate the issue urged on this Court by Petitioners in this case. *See, e.g., Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'") (citation omitted).

II. THE DECISION BELOW CONSTITUTES AN UNREMARKABLE APPLICATION OF INTERMEDIATE FIRST AMENDMENT SCRUTINY TO THE UNIQUE FACTS OF THIS CASE

As the foregoing discussion demonstrates, Petitioners are incorrect when they suggest that the decision below "strikes down provisions of both a federal and a state statute" and "calls into question the constitutionality of provisions enacted by a majority of the states." Plaintiffs' Pet. at 12. Rather, the Third Circuit held only that, under "the unique facts and circumstances of this case," App. at 14a, the imposition of civil liability on these Respondents pursuant to 18 U.S.C. § 2511(1)(c) & (d) and 18 Pa. Cons. Stat. Ann. § 5725 does not survive intermediate scrutiny under the First and Fourteenth Amendments. The court of appeals' formulation of this Court's standard of intermediate scrutiny is both unremarkable and consistent with the constitutional application of the Wiretapping Acts in the run of cases in fact contemplated by the legislature.

Petitioners do not complain that the level of scrutiny adopted by the court of appeals at their urging was incorrect. Moreover, Petitioners do not contend that the Third Circuit misapprehended the scope of review contemplated by the intermediate scrutiny doctrine. As the court of appeals correctly noted, intermediate scrutiny "encompasses some balancing of the state interest and the means used to effectuate

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hands of the press, unless the need for secrecy is manifestly overwhelming.").

that interest." App. at 29a. The decision below reflects the Third Circuit's recognition that intermediate scrutiny contemplates an examination of, *inter alia*, "whether the regulation is 'narrowly tailored to serve a significant governmental interest,'" *id.* 30a (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)), and whether the burden that the regulation places on speech is "'substantially broader than necessary'" to vindicate that interest, App. at 41a-42a (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). *See also, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1397 (2000) (describing relevant element of intermediate scrutiny as requirement "that the restriction [be] no greater than is essential to the furtherance of the government interest"); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) (describing relevant element of intermediate scrutiny as requirement that regulation not "'"burden substantially more speech than is necessary to further"'" government interest) (citations omitted). Thus, the court of appeals limited its inquiry to whether "the government has shown that its proffered interest is sufficiently furthered by application *to these defendants* of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake." App. at 32a (emphasis added).[5]

At bottom, therefore, Petitioners' request for review in this Court rests on their disagreement with the manner in which

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[5] In dissent in the court of appeals, Judge Pollak emphasized his agreement with the majority's formulation of the constitutional principles governing its decision; he parted company with the majority only in the manner in which it applied that principle to the facts of the case. *See* App. at 45a (Pollak, J., dissenting) ("I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's *ultimate application* of its analysis to the case at bar.") (emphasis added); *see also id.* 46a-47a (same).

the Third Circuit applied this Court's intermediate scrutiny standard to the facts of this case. The limited scope of the decision below is further reflected in the court of appeals' statement of the issue it actually decided:

> [W]hether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

Id. 2a.

In this fact-specific context — involving the "disclosure" of information of significant public concern to citizens of a local community by persons who played no role of any kind in an interception in violation of the Wiretapping Acts — the Third Circuit rejected the government's contention that, as applied in this case, "the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." *Id.* 33a. The court correctly recognized that the government had "offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation." *Id.* Under these circumstances, the Third Circuit concluded, application of the Wiretapping Acts to Respondents burdened more speech than necessary since "the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* 35a. In so holding, the court of appeals expressly disclaimed any intent that its ruling apply beyond the specific circumstances presented — *i.e.*, circumstances in which the Wiretapping Acts are applied to punish those who disclose information about matters of public con-

cern and "who neither encouraged nor participated directly or indirectly in the interception, an application *rarely* attempted." *Id.* 39a (emphasis added). As construed by the court of appeals, therefore, the statutes — including the private damages remedies at issue here — remain in full force and effect in all other circumstances.

The court of appeals' application of intermediate scrutiny in this narrow context accords with this Court's First Amendment jurisprudence. Simply put, the government has failed to provide any support, from the federal Wiretapping Act's legislative history or otherwise, for its contention that the statutory prohibition on disclosure of an intercepted communication, as applied to disclosure of a newsworthy matter of significant public concern by an innocent recipient of the communication, is narrowly tailored to effectuate the Act's preclusion of illegal interception in the first instance. *Id.* 33a.[6] As this Court has marked the contours of intermedi-

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[6] The Solicitor General attempts to find support for the proposition that effective deterrence of illegal interception of telephone conversations requires application of a prohibition on disclosure to those, like Respondents here, who did no more than disclose to the public the newsworthy contents of such a conversation, in the Senate Report's passing observation that "'[o]nly by striking at all aspects of the problem can privacy be adequately protected.'" U.S. Pet. at 15 (quoting S. REP. NO. 1097, 90th Cong., 2d Sess. (1968) ("1968 Senate Rep.") at 69). The quoted passage, however, reflects a focus by Congress not on one who disseminates information, but rather on an entirely different player in the interception process:

> It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture and advertising *of intercepting devices*. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected.

1968 Senate Rep. at 69 (emphasis added). The legislative history contains no indication that Congress was concerned with the type of newsworthy disclosure at issue here; to the contrary, to the extent it addressed the use

ate scrutiny, the Third Circuit could not properly have reached a different conclusion on the facts of this case:[7] "'[w]hen the government defends a regulation on speech . . . .[i]t must demonstrate that . . . *the regulation will in fact alleviate these harms in a direct and material way.*'" App. at 34a n.5 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995)) (emphasis supplied by court of appeals); *accord 44 Liquormart, Inc. v.*

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and disclosure provisions at all, its attention was focused on the protection of confidential information such as trade secrets and other proprietary business information that do not constitute matters of public concern, as well as truly private affairs such as marital and similar deeply personal communications. *See id.* at 67.

[7] The Solicitor General asserts that the legislative purpose in prohibiting the use and disclosure of intercepted communications can be analogized to the deterrent effect of statutes that sanction the possession of child pornography or that prohibit the receipt of stolen property. *See* U.S. Pet. at 13. Such analogies are, however, faulty. Reliance by Petitioners on *Osborne v. Ohio*, 495 U.S. 103 (1990), and *New York v. Ferber*, 458 U.S. 747 (1982), *see* U.S. Pet. at 13 & n.7, is misplaced because the statutes at issue in those cases regulated child pornography, a category of speech that, unlike that of Respondents here, is not entitled to protection under the First Amendment. The government's analogy to statutes criminalizing the receipt of stolen goods overlooks both the constitutional distinction between wholly unprotected conduct and the protected speech of Respondents here, as well as the fact that, because money drives the market for stolen goods, eliminating the buyer will of necessity have a *direct* impact on the seller in that context. In this case, whatever may have been the motive of the interceptor of the Bartnicki-Kane conversation, it was not to sell the tape recording. Moreover, the judgment below does not disturb the applicability of the Wiretapping Acts to circumstances—such as industrial espionage or insider trading—in which money provides a financial incentive for disclosure. Nor does it prevent application of the Acts to the disclosure of purely private communications unrelated to matters of public concern such as those, referenced by Congress, between spouses about their marriage, or between patients and their doctors. *See* 1968 Senate Rep. at 67; S. REP. NO. 541, 99th Cong., 2d Sess. (1986) at 3.

Rhode Island, 517 U.S. 484, 505 (1996) (while "common sense supports the conclusion" that prohibition against price advertising of alcohol would lead to increase in prices and lower demand, "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *City of Erie v. Pap's A.M.*, 120 S. Ct. at 1404 (Souter, J., concurring in part, dissenting in part) (concluding that the "upshot" of Court's precedents "is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (burden of justifying restriction on commercial speech "is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981) (zoning ordinance banning live entertainment failed heightened scrutiny where petitioners presented no evidence, and court did not "find it self-evident," that live entertainment would cause problems with parking, trash, police protection, and medical facilities).

Finally, the Solicitor General's contention that the Wiretapping Acts, as applied here, burden no more speech than "[]necessary" or "'essential'" to achieve the asserted content-neutral statutory purpose, U.S. Pet. at 12, 13 (citation omitted), is doubly flawed.[8] First, the legislative history not only

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[8] To the extent that the government maintains that an additional justification for enforcing the Wiretapping Acts against Respondents is that prohibiting disclosure prevents further injury flowing from the initial unlawful interception, it has no proper application under the circumstances of this case. The public disclosure of a conversation between two

fails to articulate any basis for the government's contention in this regard, it cannot reasonably be squared with Congress' decision to limit to a fine the criminal penalties to be imposed on those who, in circumstances such as are presented by this case, in fact intercept protected communications. *See* 18 U.S.C. § 2511(4)(b)(ii); *see also Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street."). Enhancement of those criminal penalties to include at least the prospect of incarceration would, it can reasonably be presumed, have a more direct effect on illegal interceptions than the indirect prohibition on disclosure at issue here. *See, e.g., Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *4 (D.D.C. July 28, 1998) (deterrent value of $500 fine imposed on interceptors in that case was "almost laughable"), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000) (No. 99-1709).

Second, by imposing liability on those who have "reason to know" that a disclosed communication involving a matter of public concern was unlawfully intercepted, the statutes are

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union officials in which they seriously contemplate acts of violence against public officials, *see* App. at 36a-37a, in no sense gives rise to the kind of injury Congress sought to redress. Indeed, Bartnicki and Kane have expressly stipulated that they do not seek to recover damages for actual injury caused by the public disclosure of their conversation. *See* 3d Cir. App. at 358a (statement of material facts not in dispute); *see also id.* 329a (Bartnicki's cellular telephone contract reflects her recognition that such calls could be intercepted and overheard). Finally, as the Third Circuit correctly noted, any argument that Bartnicki and Kane are entitled to damages attributed to the "publicity" given by Respondents to their scheme—which concededly constitutes a matter of significant public concern—would rightly be subject to strict scrutiny. *See* App. at 27a. *Cf. Jenkins v. Bolla*, 600 A.2d 1293, 1296 (Pa. Super. Ct. 1992) (no cause of action for publication of private facts where information disclosed relates to matter of public concern).

demonstrably overbroad, reaching — as the Petitioners contend they do here — persons whose only "reason to know" of an unlawful interception derives from the unadorned fact that a recording exists. *See* App. at 10a ("'a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception'") (quoting district court); *id.* 56a (Pollak, J., dissenting) ("reason to know" standard poses "substantial First Amendment difficulty"). Under the "reason to know" standard, any person who heard the recording at issue on the radio and then disclosed a portion of its contents across the dinner table would have as much "reason to know" it had been intercepted unlawfully as did Respondents here. "Not only is this not narrow tailoring, this is not tailoring of any sort." *Boehner*, 191 F.3d at 485 (Sentelle, J., dissenting); *see also id.* ("I do not see how we can draw a line today that would punish [the defendant source] and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information . . . and published it again.").

In the last analysis, the "principal difference[]" between Petitioners and the court of appeals "lies in the weight [they assign] the factors to be balanced" in the application of intermediate scrutiny to the facts of this case. App. at 37a. "A petition for a writ of certiorari," however, "is rarely granted when the asserted error consists," as it does here, of an alleged "misapplication of a properly stated rule of law." S. Ct. Rule 10.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *BOEHNER v. McDERMOTT*

Finally, Petitioners contend that the decision below conflicts with that of the District of Columbia Circuit in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), a case the So-

licitor General describes as "virtually identical" to this one. U.S. Pet. at 15-16; *see also* Plaintiffs' Pet. at 13 ("[t]he conflict between the Third Circuit's decision in this case and the D.C. Circuit's decision in *Boehner* is clear and inescapable"). An examination of the decisions, however, reveals (i) that the two courts each applied the same constitutional principle in an appropriately fact-specific, narrow manner, and (ii) that the result in each is properly attributed to the unique facts at issue.

In *Boehner*, the D.C. Circuit, like the Third Circuit here, determined that application of 18 U.S.C. § 2511(1)(c) & (d) should be subjected to intermediate scrutiny. *See Boehner*, 191 F.3d at 467 (Randolph, J.); *id.* at 479 (Ginsburg, J.). In separate opinions, Judges Randolph and Ginsburg applied that standard to the facts before them, expressly limiting the scope of their ruling to that specific context. *See id.* at 478 (Randolph, J.) (statutes "are not unconstitutional *as applied in this case*") (emphasis added); *id.* at 478-79 (Ginsburg, J.) (emphasizing limited reach of holding and concluding that federal Wiretapping Act "is not unconstitutional *as applied in this case*") (emphasis added); *see also* App. at 45 n.2 (Pollak, J., dissenting) (court in *Boehner* "was at pains to point out the limited scope of its ruling"). Indeed, as Judge Randolph emphasized:

> McDermott's challenge is only to the statute as it applies to his delivery of the tape to the newspapers. Whether a different analysis would govern if, for instance, McDermott . . . read[] a transcript of the tape in a news conference, is therefore a question not presented here. Nor should we be concerned with whether [the Wiretapping Acts] would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone.

191 F.3d at 467 (Randolph, J.); *see also id.* at 477-78 ("Whether the statute would be constitutional as applied to a newspaper who published excerpts from the tape — who, in other words, engaged in speech — thus raises issues not before us.").

Thus, the D.C. Circuit concluded only that, *as applied against McDermott*, the statute withstood intermediate scrutiny. Specifically, in view of what Judges Randolph and Ginsburg described as McDermott's role in the illegal "transaction" that resulted in publication of the conversation by others, the court determined that the government's interest in protecting the privacy of such conversations would be furthered by subjecting McDermott to civil liability. *See id.* at 478. Moreover, the court concluded, the burden on First Amendment interests under such circumstances was "'no greater than is essential to the furtherance of that interest.'" *Id.* at 470 (citation omitted).

The D.C. Circuit's decision in *Boehner* is, therefore, self-evidently a product of the unique facts of that case. Those facts, in turn, are properly distinguished from those at issue here in a manner that determined the outcome of the court's application of the intermediate scrutiny standard in *Boehner*. In that case, it was undisputed that the original interception was unlawful. John and Alice Martin, who are alleged to have deliberately followed Representative Boehner's automobile for that purpose, *see Boehner v. McDermott*, 1998 WL 436897, at *1, "used a radio scanner to eavesdrop on the conversation" between Boehner and his colleagues, which they then recorded, *Boehner*, 191 F.3d at 465. The Martins "publicly confessed" their role and ultimately pleaded guilty to criminal charges brought against them. *Id.*[9] Moreover, they

[9] As Judge Randolph recognized in *Boehner*, the fact that McDermott knew who his source was and that his source had acquired the recording unlawfully distinguishes *Boehner* from *Landmark Communications, Inc. v. Virginia*, 435 U.S. at 838, in which the record "contained no evidence

"personally delivered the tape to Representative McDermott" under cover of a letter explaining that "the tape contained 'a conference call heard over a scanner.'" *Id.* As reflected in the same letter, the Martins apparently had entered into an agreement to the effect that McDermott "would arrange for them to receive immunity from criminal prosecution" in return for delivery of the tape. *Boehner v. McDermott*, 1998 WL 436897, at *1.

Thus, as the facts were presented to the D.C. Circuit in the context of McDermott's motion to dismiss, he had notice at the time he received the tape both that its acquisition had, in fact, been illegal, and that the Martins expected something of value in return for providing the cassette to him. These facts led Judge Randolph to conclude that McDermott had gained access to the recording through actual participation in an illegal transaction:

> [T]hroughout this litigation, McDermott has attempted to portray himself as an innocent. Again and again he insists that he "lawfully obtained" the tape recording from the Martins. By this he means that he broke no law in taking possession of the tape. But this is hardly certain. The Martins violated [the federal Wiretapping Act] not once, but twice — first when they intercepted the

regarding who supplied the newspaper with the information [regarding a pending investigation of a state judge, dissemination of which was prohibited] or how they obtained it." *Boehner*, 191 F.3d at 474-75 (Randolph, J.). The record below, in contrast, like that in *Landmark*, reveals nothing about the origin of the recording at issue here. The facts of *Boehner*, like those at issue in *Peavy v. Harman*, 37 F. Supp. 2d 495 (N.D. Tex. 1999), *appeal pending*, No. 99-10272 (5th Cir. argued Apr. 3, 2000) (plaintiffs' conversation intercepted by defendant neighbor who made recordings available to defendant media), also effectively rebut the government's contention that, in the context of disclosures of newsworthy information involving matters of public concern, the interception itself is—as in the case of industrial espionage that Congress had in mind—"'typically a clandestine crime.'" U.S. Pet. at 3 (quoting 1968 Senate Rep. at 96).

> call and second when they disclosed it to McDermott. By accepting the tape from the Martins, McDermott participated in their illegal conduct. That transaction may have involved a quid pro quo. When they transmitted the tape to McDermott, the Martins expressed their understanding that they would be receiving immunity for their illegal conduct. The inference is that someone promised this in return for the tape. Who? The obvious candidate is McDermott, or someone acting in concert with him. . . . It is enough to point out, as Boehner does, that in receiving the tape, McDermott took part in an illegal transaction.

Boehner, 191 F.3d at 475-76 (Randolph, J.). Judge Ginsburg, whose concurrence in the judgment produced the result in *Boehner*, likewise concluded that "McDermott knew the transaction [by which he acquired the tape from the Martins] was illegal at the time he entered into it," and, as a consequence, he could not be said to have lawfully acquired it. *Id.* at 479 (Ginsburg, J.).[10] As Judge Randolph emphasized, "[t]he link between the Martins and McDermott was direct. Whether someone further down the chain would have a defense . . . that the taint of illegality was sufficiently dissipated . . . is something we do not decide." *Id.* at 469 n.7 (citation omitted).

In this case, in contrast, the record "is *devoid* of any allegation that the defendants" — *including Yocum* — "encouraged or participated in the interception in a way that would justify characterizing them as 'wrongdoers.'" App. at 33a (emphasis added). As the Third Circuit explained, "Yocum has not been

[10] Judge Sentelle, in dissent in *Boehner*, was equally explicit on this point: McDermott "willfully dealt with felons and knowingly received unlawfully obtained evidence on the chance that he might be able to use something contained therein to embarrass one of the colleagues whose ethics he was charged with policing." 191 F.3d at 481 (Sentelle, J., dissenting).

shown to have 'entered into' any transaction with the interceptors," *id.* 40a-41a, nor is there any dispute that Yocum simply discovered the cassette in his mailbox, and does not know who put it there, *see id.* 61a. There was no evidence presented in opposition to his motion for summary judgment that Yocum made any agreement with the interceptor or that he solicited a copy of the recording.[11] Thus, the Solicitor General's suggestion that the two "courts of appeals have reached different conclusions regarding the constitutionality of the application of an Act of Congress to *materially indistinguishable facts*," U.S. Pet. at 17 (emphasis added), is incorrect.

As this Court has emphasized in articulating the considerations governing review on *certiorari*, a petition will be granted only for "compelling reasons," including a conflict between two courts of appeals "on the same important matter." S. Ct. Rule 10(a). While the reasoning of the various judges in this case and in *Boehner* concededly differs in certain respects, both courts subjected the challenged statutes to intermediate scrutiny and, based on the unique facts before them, reached discrete conclusions with respect to the constitutionality of applying them in the circumstances presented. Indeed, there is no reason to believe that either court would have reached a conclusion different from that of its sister circuit if presented with the facts of the other case. It bears emphasis in this regard that both courts expressly paid close heed to the admonition of this Court

> "that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amend-

[11] Accordingly, the argument that any "taint of illegality" was sufficiently dissipated by the time the recording reached the news media's source—a question that the court in *Boehner* expressly recognized was not before it, 191 F.3d at 469 n.7—*was* squarely presented in this case.

> ment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

App. at 14a (quoting *Florida Star v. B.J.F.*, 491 U.S. at 532-33) (citations omitted); *see also Boehner*, 191 F.3d at 471 (Randolph, J.) (same). The fealty of the courts of appeals to this requirement fairly precludes the suggestion that their limited decisions, rendered on materially different records, are in conflict in any constitutionally meaningful sense.[12]

[12] Even were the D.C. and Third Circuits' respective applications of the intermediate scrutiny standard deemed to present a "'true'" conflict, "'the impact of the conflict is narrowly confined and is not apt to have continuing future consequences.'" John Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 112 (1959), *quoted in* ROBERT L. STERN *et al.*, SUPREME COURT PRACTICE (7th ed. 1993) ("SUPREME COURT PRACTICE") at 169; *see also* William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1982) (noting Court's "'policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question'"), *quoted in* SUPREME COURT PRACTICE at 171.

CONCLUSION

For the foregoing reasons, Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio respectfully request that the Petitions for Writs of Certiorari be denied.

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No. 99-1728

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

One of this Court's most important roles is "to review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The Court has performed that role not only when a lower court invalidates a federal statute on its face, but also when the statute is held to be unconstitutional as applied. See, *e.g.*, *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 421-423 (1993) (reviewing court of appeals decision holding federal gambling advertising law unconstitutional "as applied to respondent"). In this case, the court of appeals held that two basic provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 violate the First Amendment with respect to a broad and important class of applications. That decision warrants review.

1. Seeking to avoid further review, respondents contend that the Third Circuit's decision constitutes a "fact-bound" application of settled First Amendment principles to "the unique facts of this case." Vopper Br. in Opp. i, 4; see Yocum Br. in Opp. 5-6. The Third Circuit's own opinion disposes of that argument. The Third Circuit framed its holding in the following terms:

> We * * * hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception.

Pet. App. 42a.

There is nothing remotely fact-bound about that holding. Title III expressly prohibits the disclosure and use of illegally intercepted communications by any person who knows or has reason to know that the communications were intercepted in violation of Title III. 18 U.S.C. 2511(1)(c) and (d). Under the Third Circuit's holding, Section 2511(1)(c) and (d) may not be applied to anyone other than the wiretapper himself, even when the communication is disclosed or used with full knowledge of its illegal provenance, unless the person who discloses or uses the communication "participated in or encouraged" the interception. The breadth of that holding reaches far beyond the facts of this case.

Nor does it matter (Vopper Br. in Opp. 10) that, at several points in its opinion, the court of appeals specifically addressed the disclosure or use of intercepted communications concerning matters of "public significance." See, *e.g.*, Pet. App. 2a. Even if the decision were explicitly confined to cases involving matters of "public significance," the breadth and import of the

decision would be largely unchanged. As a practical matter, it is information of public significance that is most likely to be passed from a wiretapper to third parties and, as in this case, to be publicly disclosed or otherwise used in violation of Section 2511(1)(c) and (d). Indeed, this case and *Boehner* v. *McDermott*, 191 F.3d 463 (D.C. Cir. 1999), petition for cert. pending, No. 99-1709, both concern the application of Section 2511(1)(c) with respect to communications on matters of public import. Cases involving the use and disclosure of communications that are not of public concern, such as communications between patients and their doctors (Vopper Br. in Opp. 12 n.7), in contrast, promise to be relatively more infrequent, since such communications, once intercepted, are unlikely to be disclosed by the wiretapper or be published by the media.

The constitutional reasoning underlying the Third Circuit's decision, moreover, can hardly be considered fact-bound. The decision below rests chiefly on two determinations by the court of appeals. The first is that the government has not shown that prohibiting the disclosure and use of illegally intercepted communications materially deters electronic surveillance in the first instance. Pet. App. 33a-35a. The second is that, even though Section 2511(1)(c) and (d) proscribes disclosure and use of illegally intercepted communications only by persons who know or have reason to know of the communication's illegal provenance, it may deter the news media from publishing material that is *not* the product of illegal surveillance. *Id.* at 36a-37a. We have summarized the shortcomings of that reasoning in our petition. Pet. 13-15. What bears note here is that the court of appeals' reasoning is not tied to the particular facts of this case. Instead, its reasoning applies with equal force (or lack of force) to any case in which

Section 2511(1)(c) and (d) is applied to the disclosure or use of illegally intercepted communications of public significance by persons who did not participate in the interception.[1]

Moreover, by its terms, the Third Circuit's decision applies not only to Title III, but also to the corresponding provisions of the Pennsylvania electronic surveillance statute. And as explained in our petition, the court's reasoning is equally applicable to the electronic surveillance laws of numerous other States. Even with respect to Title III alone, the decision has serious practical implications for new and rapidly expanding private communications technologies like wireless telephones and the Internet, which are relatively vulnerable to electronic surveillance and therefore are in particular need of the additional protection that Section 2511(1)(c) and (d) provides. See Pet. 19-20 & n.9. Respondents' submission does nothing to dispel the practical, as well as doctrinal, significance of the decision below.

2. As explained in our petition, the decision below is also inconsistent with *Boehner* v. *McDermott*, *supra*, in which the D.C. Circuit rejected a virtually indistinguishable First Amendment challenge to the constitutionality of 18 U.S.C. 2511(1)(c) and a parallel Florida statute. See Pet. 16-17. Respondents' effort to distinguish *Boehner* (Vopper Br. in Opp. 15-21) is unsuccessful.

[1] When the constitutionality of an Act of Congress is called into question in private litigation, federal courts not only must notify the Attorney General and permit the United States to intervene in defense of the statute, but also must afford the United States the opportunity to make a "presentation of evidence" on the constitutional issue. 28 U.S.C. 2403(a). In this case, however, the United States did not have that opportunity, because it did not receive notice of the constitutional challenge to Title III until after the oral argument in the court of appeals. See Pet. 6. Thus, even assuming *arguendo* that an evidentiary showing were required to vindicate the challenged provisions of Title III, the court of appeals erred in invalidating those provisions without giving the United States the opportunity to provide such support. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664-668 (1994).

Although the statutory claims in this case are broader in some respects than the claims in *Boehner*, both cases include claims under 18 U.S.C. 2511(1)(c) against individuals who did not participate in the initial illegal interception of the communication, but who received a recording of the intercepted conversation and conveyed it to the news media with (according to the allegations in the complaints) knowledge or reason to know that the information was obtained in violation of Title III. In *Boehner*, the D.C. Circuit held that the application of Section 2511(1)(c) to such an individual does not violate the First Amendment. In this case, in direct contrast, the Third Circuit held that the application of Section 2511(1)(c) to such an individual (as well as to the news media) does violate the First Amendment.

Respondents argue at length that the two cases are factually distinguishable because the defendant in *Boehner* (Rep. McDermott) received the recording in circumstances that put him on notice that the recording was the fruit of an illegal interception and that the wiretappers allegedly "expected something of value in return" (immunity from prosecution). Vopper Br. in Opp. 18. Those factual distinctions have no statutory or constitutional significance. In statutory terms, 18 U.S.C. 2511(1)(c) and (d) imposes liability on those who use or disclose the contents of an intercepted communication with knowledge that it was unlawfully obtained. The statute thus renders the defendant liable if he knows of the communication's unlawful origin *at the*

time of the use or disclosure, without regard to the defendant's knowledge or conduct at the time he received it. For purposes of the statute, respondents' and McDermott's actions are therefore indistinguishable. The complaints in their respective cases both allege that they violated the statutory prohibition on disclosure of intercepted information because they knew or had reason to know of the information's illegal origin at the time they disclosed it, while neither defendant violated (and neither participated in or encouraged the violation of) the underlying prohibition on unauthorized surveillance itself.

Similarly, as a constitutional matter, there is no reason why the constitutionality of applying Section 2511(1)(c) to a particular defendant should turn on whether the wiretapper conveys illegally intercepted communications to the defendant in person or anonymously, or on whether the wiretapper acts under the mistaken impression (or simply the unilateral hope) that the defendant will provide a *quid pro quo*. Nor does the court of appeals' holding in this case—that Title III "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception," Pet. App. 42a—recognize such a distinction. In *Boehner* v. *McDermott*, as here, the defendant "use[d] or disclos[ed]" an unlawfully intercepted communication but neither "participated in [n]or encouraged the interception." In *Boehner*, the application of Title III was upheld; in this case, in contrast, it was held unconstitutional.

At a more basic level, respondents ignore the extent to which the reasoning of the two cases is inconsistent. For example, the decision in this case rests in large

measure on the Third Circuit's skepticism that prohibiting the disclosure and use of illegally intercepted communications by third parties materially strengthens the underlying prohibition on electronic surveillance. See Pet. App. 33a-35a, 41a. In contrast, the D.C. Circuit regarded it as self-evident that prohibiting the disclosure of illegally intercepted information by third parties contributes to the goal of deterring illegal wiretapping by reducing the incentive for such activity. See *Boehner*, 191 F.3d at 469-470, 478.[2] See also *id.* at 471 (invalidation of Section 2511(1)(c) would "render[] the government powerless to prevent disclosure of private information" because criminals can "launder" illegally intercepted communications) (internal quotation marks omitted).[3]

In short, the two decisions take fundamentally disparate approaches to the First Amendment issues in this case and reached contrary results on consti-

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[2] Indeed, it was for that very reason that the dissent in this case quoted extensively from *Boehner*. See Pet. App. 50a-51a (Pollack, J., dissenting) (quoting *Boehner*, 191 F.3d at 470).

[3] The decisions are similarly at odds regarding the government's interest in protecting against the loss of privacy that occurs when illegally intercepted communications are disclosed following their interception. The Third Circuit acknowledged that "the prohibition on using or disclosing the contents of an illegally intercepted communication serves that interest," but mistakenly regarded the interest as a "content-based" one that cannot be taken into account for purposes of intermediate scrutiny under the First Amendment. See Pet. App. 26a-27a. In contrast, the D.C. Circuit treated the government's interest in protecting privacy by prohibiting disclosure of intercepted communications as a "substantial governmental interest unrelated to the suppression of free expression," and hence one that is properly cognizable under intermediate scrutiny. *Boehner*, 191 F.3d at 468 (internal quotation marks omitted).

tutionally indistinguishable facts. For that reason, too, certiorari should be granted.

3. As explained in our petition, this case presents the question this Court expressly reserved in *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989): whether, and in what circumstances, the government constitutionally may prohibit the dissemination of information that comes from a source who obtained the information illegally. See *id.* at 535 n.8 ("We have no occasion to address" the question "whether, in cases where information has been *acquired unlawfully* by a newspaper or *by a source*, government may ever punish not only the unlawful acquisition, but *the ensuing publication* as well.") (emphases added). The ruling of the court of appeals addresses precisely that issue, holding that Title III may not constitutionally be applied to prohibit the disclosure (or other use) of illegally intercepted information by persons who did not themselves participate in or encourage the interception. Pet. App. 42a.

Respondents assert that the question reserved in *Florida Star* is not presented in this case. See Vopper Br. in Opp. 5-7. That assertion reflects a basic misunderstanding of the Third Circuit's treatment of *Florida Star*. See Pet. App. 10a-14a. Respondents correctly point out that the Third Circuit declined to decide whether the challenged provisions of Title III would satisfy the strict scrutiny test employed in *Florida Star* itself. Vopper Br. in Opp. 6. The Third Circuit did so, however, precisely because it concluded that this case is not governed by the holding in *Florida Star*, but rather concerned the issue *Florida Star* reserved—whether and to what extent it is permissible to impose liability for the publication of information that a source obtained unlawfully. See Pet. App. 13a. Moreover, defending the judgment, respondents argue

(Vopper Br. in Opp. 7 n.3) that the court of appeals *erred* by failing to apply strict scrutiny, notwithstanding *Florida Star*'s reservation of the issue. Compare *Boehner*, 191 F.3d at 480 (Sentelle, J., dissenting) (applying strict scrutiny). The level of scrutiny to be applied, of course, is a critical issue in this case, as is the proper application of that level of scrutiny to the use and disclosure prohibitions that Congress found necessary to the protection of privacy when it enacted Title III.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 99-1687, 99-1728

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER *et al.*,
Respondents.

On Writs Of Certiorari to the United States Court of Appeals for the Third Circuit

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
(SCRANTON)

Case No. 94-CV-1201

GLORIA BARTNICKI, et al.

v.

FREDERICK W. VOPPER, et al.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
8/1/94	1	COMPLAINT alleging interception of telephone conversation. Receipt #: 60524 Amt: $120.00 (ps)
9/23/94	8	ANSWER by defts Frederick W. Vopper, Keymarket of NEPA and Lackazerne, Inc.; c/s. (ks) [Entry date 09/26/94]
3/3/95	16	AMENDED complaint [1-1]; adding Jack Yocum (C of S) (is) [Entry date 03/06/95]
6/30/95	25	ANSWER by Jack Yocum to amd complaint and C of S (ls)
9/29/95	40	MOTION by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. for summary judgment & c/s. (rm)
9/29/95	42	Statement of facts by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. in support of motion for summary judgment [40-1] (rm)

DATE	NO.	PROCEEDINGS
9/29/95	43	MOTION by plaintiff Anthony F. Kane Jr., defendant Frederick W. Vopper, defendant Keymarket of NEPA for summary judgment w/cert of nonconcur, exhibits & c/s. (rm) [Entry date 10/02/95]
9/29/95	44	Statement of facts by defendant Frederick W. Vopper, defendant Keymarket of NEPA, defendant Lackazerne, Inc. in support of motion for summary judgment [43-1] (rm) [Entry date 10/02/95]
9/29/95	45	MOTION by defendant Jack Yocum for summary judgment (jh) [Entry date 10/03/95]
9/29/95	46	STATEMENT OF MATERIAL FACTS as to which there is no genuine issue to be tried by defendant Jack Yocum in support of motion for summary judgment [45-1] and c of S. (jh) [Entry date 10/03/95]
10/30/95	49	BRIEF by defendant Jack Yocum in support of motion for summary judgment [45-1] with exhs. attached and c of s. (jh)
10/30/95	50	Excerpts of Sworn Statement of Frederick Vopper Submitted in Support of Plaintiff's Motion for Summary Judgement (ps) [Entry date 10/31/95]
10/30/95	51	Excerpts of Sworn Statement of Gloria Bartnicki Submitted in Support of Plaintiff' s Motion for Summary Judgement (ps) [Entry date 10/31/95]
10/30/95	52	Excerpts of Sworn Statement of Anthony Kane Submitted in Support of Plaintiff's

DATE	NO.	PROCEEDINGS
		Motion for Summary Judgement (ps) [Entry date 10/31/95]
10/30/95	53	Brief by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. in support of motion for summary judgment (40-1), motion for summary judgment (43-1] w/ C of S. (ps) [Entry date 10/31/95]
10/30/95	54	Exhibit 1- Transcript of Taped Telephone Conversation Submitted in support of Plaintiff's Motion for Summary Judgement (ps) [Entry date 10/31/95]
10/30/95	55	EXCERPTS of Sworn Statement of John Yocum FILED by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. in support of motion for summary judgment [40-1] with 16 deposition transcripts attached. (bs) [Entry date 11/01/95]
10/30/95	56	Brief by Media Defts. in support of motion for summary judgment [43-1]. C of S 10/30/95. (bs) [Entry date 11/01/95]
10/30/95	57	Media Defts. Ans. to deft's Jack Yocum Statement of Material Facts. C of S 10/30/95. Cbs) [Entry date 11/01/95]
10/30/95	58	Media defts Ans. to pltfs' Stmt of material facts. C of S 10/30/95. (bs) [Entry date 11/01/95]
10/30/95	59	AFFIDAVIT - of deft Jack Yocum relative to the above captioned action. (jb) [Entry date 11/01/95]
11/27/95	63	Brief by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. in opposition to motion

DATE	NO.	PROCEEDINGS
		for summary judgment [45-1] with Cert of Service (ao) [Entry date 11/29/95]
11/27/95	64	Response by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. to the statement of undisputed material facts of Frederick W. Vopper, Keymarket of NEPA, Inc. and Lackazerne, Inc. with Cert of Service (ao) [Entry date 11/29/95]
11/27/95	65	Response by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. to the statement of material facts as to which deft, Jack Yocum, contends there is no genuine issue to be tried with Cert of Service. (ao) [Entry date 11/29/95]
11/27/95	66	Brief by Jack Yocum in opposition to plf's motion for summary judgment [40-1] C/S (cm) [Entry date 11/29/95]
11/27/95	67	Brief by defts' Frederick W. Vopper, Keymarket of NEPA, Lackazerne, Inc. in opposition to motion for pltfs' motion for summary judgment [40-1] with Cert of Service. (ao) [Entry date 11/30/95]
11/29/95	69	Response by defendant Jack Yocum to Media defts' statement of material facts (jw) [Entry date 12/04/95]
11/29/95	70	Response by defendant Jack Yocum to pltfs' statement of material facts (jw) [Entry date 12/04/95]
11/30/95	68	BRIEF - by plaintiffs in opposition to defts' motions for summary judgment; C of S (jb) [Entry date 12/01/95]

DATE	NO.	PROCEEDINGS
12/14/95	71	REPLY BRIEF - by defendant Jack Yocum in support of motion for summary judgment [45-1] (am)
12/14/95	72	Reply brief by defendants Vopper, Keymarket of NEPA et al in support of motion for summary judgment C of S (is) [Entry date 12/15/95]
6/17/96	73	MEMORANDUM AND ORDER: by Judge Edwin M. Kosik (1) denying motion for summary judgment [43-1] (2) denying motion for summary judgment [45-1] (3) denying motion for summary judgment [40-1] . (4) A pretrial conf shall be set forthwith. (cc: all counsel) (rm)
7/1/96	75	MOTION by defendant Frederick W. Vopper, defendant Keymarket of NEPA, defendant Lackazerne, Inc. for reconsideration of memo & order dtd 6/17/96 with Cert of NonConcurrence &. Cert of Service. (ao) [Entry date 07/02/96]
7/1/96	76	MOTION by defendant Jack Yocum for reconsideration of order dated 6/17/96 with Certs of NonConcurrence & Service. (ao) [Entry date 07/02/96]
7/16/96	78	BRIEF by defendant Jack Yocum IN SUPPORT of motion for reconsideration of order dated 6/17/96 [76-1] with Cert of Service. (ao) [Entry date 07/17/96]
7/19/96	80	BRIEF by defendant Frederick W. Vopper, defendant Keymarket of NEPA, defendant Lackazerne, Inc. IN SUPPORT of motion for reconsideration of memo & order dtd

DATE	NO.	PROCEEDINGS
		6/17/96 [75-1] with Cert of Service. (ao) [Entry date 07/22/96]
8/12/96	85	BRIEF by plaintiff Gloria Bartnicki, plaintiff Anthony F. Kane Jr. IN OPPOSITION to motion for reconsideration of order dated 6/17/96 (76-1]; reply brief due 8/25/96, motion for reconsideration of memo & order dtd 6/17/96 [75-1] reply brief due 8/25/96 & c/s. (rm)
8/29/96	86	REPLY BRIEF by defendant Jack Yocum in support of motion for reconsideration of order dated 6/17/96 [76-1] , w/ c ofS. (ci) [Entry date 09/03/96]
8/29/96	87	REPLY BRIEF- by defendants Frederick W. Vopper, Keymarket of NEPA, and Lackazerne, Inc. in support motion for reconsideration of memo & order dtd 6/17/96 [75-1], w/ c of S. (ci) [Entry date 09/03/96]
11/8/96	88	MEMORANDUM AND ORDER: by Judge Edwin M. Kosik - 1. Defts Vopper, Keymarket of NEPA, Inc.'s motion for reconsideration of order dated 6/17/96 [75-1] is denied; 2. Deft Yocum's motion for reconsideration of memo & order dated 6/17/96 [76-1] is denied; and 3. a pretrial conference shall be set forthwith. (cc: all counsel) (ao)
12/31/97	96	ORDER by Judge Edwin M. Kosik THAT: The above case being certified for an appeal to the USCA for the 3rd Circuit, the Clerk of Court is directed to close this case. Case terminated (cc: all counsel) (ep)

DATE	NO.	PROCEEDINGS
1/7/98	97	ORDER by Judge Edwin M. Kosik certifying that Memo & Order dated June 14, 1996, and Order of 11/8/96 involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order will materiall advance the ultimate termination of this litigation (cc: all counsel) (ep)
3/2/98	98	CERTIFIED COPY of Appellate Court Order: The foregoing petition for permission to appeal is GRANTED; USCA # 98-8010 (ep) [Entry date 03/03/98]
3/3/98	99	RECEIPT #: 333 70901 Amount: $105.00 From: counsel for pltf Purpose: Appeal FF (ao) [Entry date 03/12/98]
3/3/98	99	Notice of appeal by defendants from District Court orders filed 11/8/96 (88-1] & 6/17/98 [73-1] (Filing fee paid, TPO handed to attorney, certified copies, notice of appeal, order being appealed, with info/ack letter, orders filed 11/8/96 [8a-1] & 6/17/96 [73-1] to USCA. (CC: cnsl, Ct.) Receipt No. & Amt: 333 70901 (ep) [Entry date 03/13/98]

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Case No. 98-7156

GLORIA BARTNICKI, *et al.*

v.

FREDERICK W. VOPPER, *et al.*

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/26/98	CIVIL CASE DOCKETED. Notice filed by Frederick W. Vopper, Keymarket NEPA Inc. and Lackazerne Inc. Case Transferred from Misc. No. 98—8010. (ddw)
8/3/98	AMENDED-BRIEF on behalf of Appellant's Frederick W. Vopper
8/5/98	BRIEF on behalf of Appellee Jack Yocum, Pages: 20, Copies: 10, Delivered by mail, filed. Certificate of Service date 7/3/98. (ddw)
8/20/98	BRIEF on behalf of Appellees Gloria Bartnicki and Anthony F. Kane, Pages: 30, Copies: 10, Delivered by mail, filed. Certificate of Service date 8/20/98. (ddw)
8/21/ 98	MOTION filed by Proposed Amicus-Appellee PA State Ed Assoc for leave to file brief as amicus curiae. Answer due 8/31/98. Certificate of Service dated 8/20/98. (ddw)

DATE	PROCEEDINGS
8/31/98	ORDER (Sloviter, Authoring Judge, Cowen, Circuit Judges and Pollak, District Judge) granting motion for leave to file brief as amicus curiae by PA State Ed Assoc., filed. (ddw)
8/31/ 98	AMICUS BRIEF on behalf of PA State Ed Assoc. Pages: 21, Delivered by mail, filed. Certificate of Service date 8/20/98. (ddw)
10/5/98	ARGUED Monday, October 5, 1998 Panel: Sloviter, Cowen, Circuit Judges and Pollak, District Judge. (cg)
10/6/98	CLERK'S LETTER to counsel written at the direction of the Court to Hon. D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, Janet Reno, Attorney General of the United States and to the United States Attorney of the Middle District of Pennsylvania, David M. Barasch, with copies to all counsel. (See letter for particulars). (cg)
11/18/98	MOTION filed by USA for leave to intervene. Answer due 11/27/98. Certificate of Service dated 11/17/98. (ddw)
12/30/98	ORDER (Sloviter, Authoring Judge, Cowen, Circuit Judges and Pollak, District Judge) granting motion by USA for leave to intervene, filed. (ddw)
12/30/98	INTERVENOR BRIEF on behalf of USA, Pages: 42 Copies: 10 Delivered by mail, filed. Certificate of service date 11/17/98. (ddw)
8/27/99	ORDER (Clerk) advising on January 14, 1999, Frederick W. Vopper a/k/a Fred Williams Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc. d/b/a WGBI Radio, who were-defendants in the lower court, filed a petition for

DATE	PROCEEDINGS
	leave to appeal in the Court of Appeals. Defendant Jack Yocurn filed an answer to the petition for leave to appeal in which Yocum stated that he "concurs in the Media Defendants' Petition for Permission to Appeal and hereby joins in the request. . . ". By order entered February 26, 1998, this Court granted the petition for leave to appeal. It appearing that the answer filed by Yocum should have also been construed as a joinder in the petition for leave to appeal and that the petition was subsequently granted, it is hereby ordered that Jack Yocum is deemed an appellant in the appeal pending before the Court, filed. (mmb)
12/27/99	PUBLISHED OPINION (Sloviter, Authoring Judge, Cowen, Circuit Judges, Pollak*, District Judge), filed.* Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation. (clc)
12/27/99	JUDGMENT reversed and remanded to the district court with instructions to grant the motion for summary judgment in favor of the defendants. Costs taxed against appellees, filed. (clc)
1/7/00	ORDER AMENDING DISSENTING OPINION Sloviter, Cowen, Circuit Judges, Pollak, Authoring Judge, filed. (sma)
2/10/00	PETITION by Appellees and Amicus-appellee for rehearing en banc. Certificate of service dated 2/9/00, filed. (lc)
2/10/00	PETITION by Intervenor USA for rehearing en banc. Certificate of Service dated 2/9/00, filed. (lc)

DATE	PROCEEDINGS
2/25/00	ORDER (Becker, Chief Judge, Sloviter, Authoring Judge, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Circuit Judges, Pollak*, District Judge) denying petition for in banc rehearing by Appellees Gloria-Bartnicki, Anthony F. Kane Jr. and Amicus-appellee PA State Ed Assoc. and denying petition for in banc rehearing by Intervenor USA. Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing, filed. *Sitting by designation (lc)
2/28/00	AMENDED ORDER (Becker, Chief Judge, Sloviter, Authoring Judge, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Cowen*, Circuit Judges, Pollak*, District Judge) denying petition for in banc rehearing by Appellees Gloria Bartnicki and Anthony F. Kane Jr. and Amicus-appellee PA State Ed Assoc. and denying petition for in banc rehearing by Intervenor USA. Judges Greenberg, Scirica, Nygaard, Alito and Rendell would have granted the petitions for rehearing, filed. *Limited to panel rehearing only (lc)
3/6/00	MANDATE ISSUED, filed. (lc)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No.

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,
Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE,
Defendants

COMPLAINT

The Plaintiffs, GLORIA BARTNICKI AND ANTHONY F. KANE, JR., by and through their counsel, Koff, Wendolowski, Ferguson & Mangan, P.C., hereby complain of the Defendants as follows:

I. Jurisdiction and Venue

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331. This action is authorized and instituted pursuant to 18 U.S.C. § 2520(e).

2. Supplemental jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1367 over the pendant state law claim that is authorized and instituted pursuant to 18 Pa.C.S. § 5725. The aforesaid state law claim is so related to the Federal claim that they form part of the same case or controversy under Article III of the United States Constitution.

3. Venue of this action is proper pursuant to 28 U.S.C. § 1391(b) in the United States District Court for the Middle District of Pennsylvania since a substantial part of the events

giving rise to this claim occurred in the Middle District of Pennsylvania.

II. Parties

4. Plaintiff, GLORIA BARTNICKI ("BARTNICKI"), is an adult individual who conducts business at 1124 Highway 315, Wilkes-Barre, Luzerne County, Pennsylvania.

5. Plaintiff, ANTHONY F. KANE, JR. ("KANE"), is an adult individual who conducts business at the Wyoming Valley Middle School, Chester Street, Kingston, Luzerne County, Pennsylvania.

6. Defendant, FREDERICK W. VOPPER ("VOPPER"), is an adult individual who resides at R.R. #6, Dallas, Luzerne County, Pennsylvania 18612. FREDERICK W. VOPPER is also known as FRED WILLIAMS and is employed by Defendants Keymarket and Lackazerne in the capacity of "radio talk show host."

7. Defendant, Keymarket of NEPA, Inc. ("KEYMARKET"), is now, and at all times mentioned in this Complaint was, a Georgia corporation licensed to do business in Pennsylvania, with a registered Pennsylvania address at 156 South Franklin Street, Wilkes-Barre, Pennsylvania 18701. Defendant KEYMARKET is the licensee of a Federal Communications Commission AM Radio Broadcasting license to transmit at 980 KHZ, and does business under the call letters WILK Radio.

8. Defendant, Lackazerne, Inc. ("LACKAZERNE"), is now, and at all times mentioned in this Complaint was, a Georgia corporation licensed to do business in Pennsylvania, with a registered Pennsylvania address at 305 Highway 315, Pittston, Pennsylvania 18640. Defendant LACKAZERNE is the licensee of a Federal Communications Commission AM Radio Broadcasting license to transmit at 910 KHZ, and does business under the call letters WGBI Radio.

9. JOHN DOE and JANE DOE are yet unknown individuals who allegedly intercepted the electronic communication of the Plaintiffs and allegedly disclosed said communication.

III. The Illegal Activity

10. At all times relevant herein, Defendant Vopper hosted a radio talk show that aired each day on WGBI-910 AM and WILK-980 AM Radio Stations from 9:00 a.m. to 12:00 p.m.

11. In or about May, 1993, a telephone conversation between BARTNICKI and KANE was surreptitiously intercepted through the use of an electronic, mechanical, or other device by JANE DOE and/or JOHN DOE, a person or persons whose identities are still unknown to the Plaintiffs.

12. Neither of the parties to the telephone conversation, BARTNICKI or KANE, authorized the aforementioned interception, monitoring and recording of the telephone communication.

13. Neither BARTNICKI nor KANE had any reason to believe that any wiretapping mechanism had been placed on the telephone, or ever consented, expressly or impliedly, to the installation of such mechanism or to the interception, monitoring or recording of such communications.

14. At some point prior to September 30, 1993, JANE DOE and/or JOHN DOE disclosed the surreptitiously recorded telephone conversation to the Defendant VOPPER, and/or other unknown representatives of the Defendants KEYMARKET and LACKAZERNE.

15. On or about September 30, 1993, and continuing on a daily basis through October, 1993, and repeatedly thereafter, Defendant VOPPER, acting as the duly authorized agent of Defendants KEYMARKET and LACKAZERNE, intentionally disclosed and published to the public the entire contents of the private telephone conversation between BARTNICKI and KANE.

16. Defendant VOPPER, acting as the duly authorized agent of Defendants KEYMARKET and LACKAZERNE knew or had reason to know that the private telephone conversation between BARTNICKI and KANE was obtained surreptitiously through the illegal interception of their telephone communication.

COUNT I—VIOLATION OF 18 U.S.C. § 2510, et seq.

17. The averments contained in paragraphs 1 through 16 are hereby incorporated by reference as though fully set forth herein.

18. Defendants' aforementioned actions constitute an unlawful interception, disclosure and use of electronic communications, prohibited by 18 U.S.C. § 2511(1), which provides, in pertinent part as follows:

> (1) Except as otherwise specifically provided in this chapter any person who . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

19. 18 U.S.C. § 2520(a) provides, in pertinent part as follows:

> "Any person whose wire, oral or electronic communication is intercepted, disclosed or intentionally used

in violation of this chapter may in a civil action recover from the person or entity that engaged in that violation such relief as may be appropriate."

20. By reason of Defendants' unlawful actions, set forth above, Plaintiffs have suffered actual damages in excess of $50,000.00.

21. Pursuant to 18 U.S.C. § 2520(c)(2), Plaintiffs are entitled to statutory damages.

22. Pursuant to 18 U.S.C. § 2520(b)(2), Plaintiffs are entitled to punitive damages.

23. Pursuant to 18 U.S.C. § 2520(b)(3), Plaintiffs are entitled to a reasonable allowance for attorneys' fees and other litigation costs reasonably incurred.

WHEREFORE, Plaintiffs request judgment against Defendants as follows:

1. Actual damages in excess of $50,000.00;
2. Statutory damages;
3. Punitive damages;
4. Reasonable attorney's fees and other litigation costs reasonably incurred in this action; and
5. Such other and further relief as this Court deems just and proper.

COUNT II—VIOLATION OF 18 Pa.C.S. § 5701, et seq.

24. The averments contained in paragraphs 1 through 23 are hereby incorporated by reference as though fully set forth herein.

25. The Defendants' above described action is an unlawful disclosure and use of electronic communications, prohibited by 18 Pa.C.S. § 5703, which provides, in pertinent part, as follows:

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

. . .

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

26. 18 Pa.C.S. § 5725(a) provides, in pertinent part, as follows:

"Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses or procures any other person to intercept, disclose or use, such communication . . . ."

27. By reason of Defendants' unlawful actions set forth above, Plaintiffs have suffered actual damages in excess of $50,000.00.

28. Pursuant to 18 Pa.C.S. § 5725(a)(l), Plaintiffs are entitled to liquidated damages.

29. Pursuant to 18 Pa.C.S. § 5725(a)(2), Plaintiffs are entitled to punitive damages.

30. Pursuant to 18 Pa.C.S. § 5725(a)(3), Plaintiffs are entitled to a reasonable allowance for attorney's fees and other litigation costs reasonably incurred.

WHEREFORE, Plaintiffs request judgment against Defendants as follows:

1. Actual damages in excess of $50,000.00;
2. Liquidated damages pursuant to 18 Pa.C.S. § 5725(a)(1);
3. Punitive damages;
4. Reasonable attorney's fees and other litigation costs reasonably incurred in this action; and
5. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

KOFF, WENDOLOWSKI, FERGUSON & MANGAN, P.C.

By: /s/ Raymond P. Wendolowski, Esq.
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Attorneys for Plaintiffs,
GLORIA BARTNICKI
and ANTHONY F. KANE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Sep. 23, 1994]

Case No.3:94-CV-01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,
Plaintiffs

vs.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE,
Defendants

ANSWER

The Defendants, Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc, d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio, by and through their counsel, Rosenn, Jenkins & Greenwald, hereby answers the complaint as follows:

1. Admitted.

2. Denied. The averments set forth in paragraph 2 are conclusions of law which are denied without the necessity of a responsive pleading.

3. Admitted.

4.-5. Denied. After reasonable investigation Defendants are without sufficient knowledge to form a belief as to the truth of the averments in these paragraphs, and, therefore, those averments are denied.

6. Admitted in part and denied in part. It is denied that Defendant Vopper's residential address is R.R. #6, Dallas,

Luzerne County, Pennsylvania 18612. The remaining averments set forth in paragraph 6 are admitted.

7. Admitted in part and denied in part. It is specifically denied that Defendant Keymarket's registered Pennsylvania address is 156 South Franklin Street, Wilkes-Barre, Pennsylvania 18701. For further answer it is averred that said address is 305 Highway 315, Pittston, Pennsylvania 18640. The remaining averments in paragraph 7 are admitted.

8. Admitted.

9. Denied. After reasonable investigation Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments set forth in this paragraph, and, therefore those averments are denied.

10. Admitted.

11.-13. Denied. After reasonable investigation, Defendants are without sufficient knowledge to form a belief as to the truth of the averments set forth in these paragraphs, and therefore those averments are denied.

14. Denied as stated. The averments set forth in Paragraph 14 are denied. For further answer it is averred that at some point prior to September 30, 1993, Jane and/or John Doe disclosed a recorded telephone conversation to the Defendant Vopper.

15. Denied. It is denied that the telephone conversation was private. It is specifically denied that Defendant Vopper repeatedly disclosed and published to the public the entire contents of the private telephone conversation between Bartnicki and Kane. For further answer it is averred that he did so on only two occasions.

16. Denied. The allegations set forth in paragraph 16 are specifically denied. It is denied that the telephone conversation was illegally intercepted. For further answer it is averred that the Defendants did not know and did not have reason to know that the telephone conversation between

Bartnicki and Kane was obtained surreptitiously through the illegal interception of their telephone communication.

17. The averments contained in paragraphs 1 through 16 of this Answer are hereby incorporated by reference as though fully set forth herein.

18.-19. Denied. The averments set forth in paragraphs 18 and 19 are conclusions of law which are denied without the necessity of a responsive pleading.

20. Denied. It is specifically denied that the answering Defendants have engaged in any unlawful actions or that the Plaintiffs have suffered any actual damages as a result of any actions of the answering Defendants.

21.-23. Denied. The averments set forth in paragraphs 21 through 23 are conclusions of law which are denied without the necessity of a responsive pleading.

WHEREFORE, the Defendants, Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio, respectfully request the Court to enter judgment in their favor and against the Plaintiffs.

24. The averments contained in paragraphs 1 through 23 of this Answer are hereby incorporated by reference as though fully set forth herein.

25.-26. Denied. The allegations set forth in paragraphs 25 and 26 are legal conclusions of law which are denied without the necessity of a responsive pleading. For further answer it is specifically averred that the Defendants' above-described action is a lawful disclosure and use of electronic communications.

27. Denied. it is specifically denied that the answering Defendants are engaged in any unlawful actions or that Plaintiffs have suffered any actual damages as a result of the conduct of the answering Defendants.

28.-30. Denied. The averments set forth in paragraphs 28 through 30 are conclusions of law which are denied without the necessity of a responsive pleading.

WHEREFORE, the Defendants, Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio, respectfully requests the Court to enter judgment in their favor and against the Plaintiffs.

FIRST AFFIRMATIVE DEFENSE

The Complaint should be dismissed because it fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The answering Defendants broadcast of the tape in question, a transcript of which is attached hereto as Exhibit "A", concerned a matter of public concern—namely, the threat of a school teacher involved in a public school teachers' strike to blow off the front porches of the homes of school directors in order to get the school directors to agree to what the teachers wanted; hence said broadcast is protected by the First Amendment and cannot be subjected to penalty under the federal or Pennsylvania statutes pursuant to which Plaintiffs attempt to assert a claim.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs had no reasonable expectation of privacy with respect to the cellular telephone conversation which is the subject of their claim and, therefore, they do not have a cause of action against the Defendants.

ROSENN, JENKINS & GREENWALD

By: /s/ Donald H. Brobst, Esquire
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Attorneys for Defendants, Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Feb. 23, 1995]

Case No.

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,
Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,
Defendants

AMENDED COMPLAINT

The Plaintiffs, GLORIA BARTNICKI and ANTHONY F. KANE, JR., by and through their counsel, Koff, Wendolowski, Ferguson & Mangan, P.C., hereby complain of the Defendants as follows:

I. Jurisdiction and Venue

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331. This action is authorized and instituted pursuant to 18 U.S.C. § 2520(e).

2. Supplemental jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1367 over the pendant state law claim that is authorized and instituted pursuant to 18 Pa.C.S. § 5725. The aforesaid state law claim is so related to the Federal claim that they form part of the same case or controversy under Article III of the United States Constitution.

3. Venue of this action is proper pursuant to 28 U.S.C. § 1391(b) in the United States District Court for the Middle District of Pennsylvania since a substantial part of the events giving rise to this claim occurred in the Middle District of Pennsylvania.

II. Parties

4. Plaintiff, GLORIA BARTNICKI ("BARTNICKI"), is an adult individual who conducts business at 1124 Highway 315, Wilkes-Barre, Luzerne County, Pennsylvania.

5. Plaintiff, ANTHONY F. KANE, JR ("KANE"), is an adult individual who conducts business at the Wyoming Valley Middle School, Chester Street, Kingston, Luzerne County, Pennsylvania.

6. Defendant, FREDERICK W. VOPPER ("VOPPER"), is an adult individual who resides at R.R. #6, Dallas, Luzerne County, Pennsylvania 18612. FREDERICK W. VOPPER is also known as FRED WILLIAMS and is employed by Defendants Keymarket and Lackazerne in the capacity of "radio talk show host."

7. Defendant, JACK YOCUM ("YOCUM"), is an adult individual who resides at 1917 Englewood Terrace, Forty Fort, Luzerne County, Pennsylvania. Yocum received and disclosed the intercepted electronic communication of the Plaintiffs.

8. Defendant, Keymarket of NEPA, Inc. ("KEYMARKET"), is now, and at all times mentioned in this Complaint was, a Georgia corporation licensed to do business in Pennsylvania, with a registered Pennsylvania address at 156 South Franklin Street, Wilkes-Barre, Pennsylvania 18701. Defendant KEYMARKET is the licensee of a Federal Communications Commission AM Radio Broadcasting license to transmit at 980 KHZ, and does business under the call letters WILK Radio.

9. Defendant, Lackazerne, Inc. ("LACKAZERNE"), is now, and at all times mentioned in this Complaint was, a Georgia corporation licensed to do business in Pennsylvania, with a registered Pennsylvania address at 305 Highway 315, Pittston, Pennsylvania 18640. Defendant LACKAZERNE is the licensee of a Federal Communications Commission AM Radio Broadcasting license to transmit at 910 KHZ, and does business under the call letters WGBI Radio.

10. JOHN DOE and JANE DOE are yet unknown individuals who allegedly intercepted and disclosed the electronic communication of the Plaintiffs.

III. The Illegal Activity

11. At all times relevant herein, Defendant Vopper hosted a radio talk show that aired each day on WGBI-910 AM and WILK-980 AM Radio Stations from 9:00 a.m. to 12:00 p.m.

12. In or about May, 1993, a telephone conversation between BARTNICKI and KANE was surreptitiously intercepted through the use of an electronic, mechanical, or other device by JANE DOE and/or JOHN DOE, a person or persons whose identities are still unknown to the Plaintiffs.

13. Neither of the parties to the telephone conversation, BARTNICKI or KANE, authorized the aforementioned interception, monitoring and recording of the telephone communication.

14. Neither BARTNICKI nor KANE had any reason to believe that any wiretapping mechanism had been placed on the telephone, or ever consented, expressly or impliedly, to the installation of such mechanism or to the interception, monitoring or recording of such communications.

15. At some point prior to September 30, 1993, YOCUM obtained a tape of the surreptitiously recorded telephone conversation and intentionally disclosed the tape to several individuals and media sources including but not limited to,

the Defendant VOPPER, and/or other unknown representatives of the Defendants KEYMARKET and LACKAZERNE, and without the permission, knowledge, or consent of the Plaintiffs.

16. On or about September 30, 1993, and continuing on a daily basis through October, 1993, and repeatedly thereafter, Defendant VOPPER, acting as the duly authorized agent of Defendants KEYMARKET and LACKAZERNE, intentionally disclosed and published to the public the entire contents of the private telephone conversation between BARTNICKI and KANE.

17. Defendant YOCUM knew or had reason to know that the private telephone conversation between BARTNICKI and KANE was obtained surreptitiously through the illegal interception of their telephone conversation.

18. Defendant VOPPER, acting as the duly authorized agent of Defendants KEYMARKET and LACKAZERNE knew or had reason to know that the private telephone conversation between BARTNICKI and KANE was obtained surreptitiously through the illegal interception of their telephone communication.

COUNT I—VIOLATION OF 18 U.S.C. § 2510, et seq.

19. The averments contained in paragraphs 1 through 18 are hereby incorporated by reference as though fully set forth herein.

20. Defendants' aforementioned actions constitute an unlawful interception, disclosure and use of electronic communications, prohibited by 18 U.S.C. § 2511(1), which provides, in pertinent part as follows:

> (1) Except as otherwise specifically provided in this chapter any person who . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or

electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

21. 18 U.S.C. § 2520(a) provides, in pertinent part as follows:

"Any person whose wire, oral or electronic communication is intercepted, disclosed or intentionally used in violation of this chapter may in a civil action recover from the person or entity that engaged in that violation such relief as may be appropriate."

22. By reason of Defendants' unlawful actions, set forth above, Plaintiffs have suffered actual damages in excess of $50,000.00.

23. Pursuant to 18 U.S.C. § 2520(c)(2), Plaintiffs are entitled to statutory damages.

24. Pursuant to 18 U.S.C. § 2520(b)(2), Plaintiffs are entitled to punitive damages.

25. Pursuant to 18 U.S.C. § 2520(b)(3), Plaintiffs are entitled to a reasonable allowance for attorneys' fees and other litigation costs reasonably incurred.

WHEREFORE, Plaintiffs request judgment against Defendants as follows:

1. Actual damages in excess of $50,000.00;

2. Statutory damages;

3 Punitive damages;

4. Reasonable attorney's fees and other litigation costs reasonably incurred in this action; and

5. Such other and further relief as this Court deems just and proper.

COUNT II—VIOLATION OF 18 Pa.C.S. § 5701, et seq.

26. The averments contained in paragraphs 1 through 23 are hereby incorporated by reference as though fully set forth herein.

27. The Defendants' above described action is an unlawful disclosure and use of electronic communications, prohibited by 18 Pa.C.S. § 5703, which provides, in pertinent part, as follows:

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

28. 18 Pa.C.S. § 5725(a) provides, in pertinent part, as follows:

"Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses or procures any

other person to intercept, disclose or use, such communication . . . ."

29. By reason of Defendants' unlawful actions set forth above, Plaintiffs have suffered actual damages in excess of $50,000.00.

30. Pursuant to 18 Pa.C.S. § 5725(a)(1), Plaintiffs are entitled to liquidated damages.

31. Pursuant to 18 Pa.C.S. § 5725(a)(2), Plaintiffs are entitled to punitive damages.

32. Pursuant to 18 Pa.C.S. § 5725(a)(3), Plaintiffs are entitled to a reasonable allowance for attorney's fees and other litigation costs reasonably incurred.

WHEREFORE, Plaintiffs request judgment against Defendants as follows:

1. Actual damages in excess of $50,000.00;
2. Liquidated damages pursuant to 18 Pa.C.S. § 5725(a)(1);
3. Punitive damages;
4. Reasonable attorney's fees and other litigation costs reasonably incurred in this action; and
5. Such other and further relief as this Court deems just and proper.

Respectfully submitted.

KOFF, WENDOLOWSKI, FERGUSON, & MANGAN, P.C.

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Attorneys for Plaintiffs, GLORIA BARTNICKI and ANTHONY F. KANE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 30, 1995]

CASE NO. 3: CV-94-1201 FILED

GLORIA BARTNICKI AND
ANTHONY F. KANE, JR.,

Plaintiffs

VS.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZWERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,

Defendants

ANSWER TO AMENDED COMPLAINT

Defendant, JACK YOCUM, by and through his counsel, FRANK J. ARITZ, ESQUIRE and CHARLES GEROW, ESQUIRE, hereby answer the Amended Complaint of the plaintiffs, the following being a statement thereof:

I. JURISDICTION AND VENUE

1. Admitted.

2. Denied. The averments in paragraph 2 constitute conclusions of law which are denied without the necessity of a responsive pleading.

3. Admitted.

II. PARTIES

4. Denied. After reasonable investigation, the answering Defendant is without sufficient knowledge to form a belief as to the truth of the averments in this paragraph and, therefore, the averments are denied.

5. Denied. After reasonable investigation, the answering Defendant is without sufficient knowledge to form a belief as to the truth of the averments in this paragraph and, therefore, the averments are denied.

6. The averment in paragraph 6 is not directed to the answering Defendant, and, therefore, no response is necessary.

7. Admitted in part. Denied in part. It is admitted that the Defendant, JACK YOCUM, is an adult individual who resides at 1917 Englewood Terrace, Forty Fort, Luzerne County, Pennsylvania. It is admitted that YOCUM received a copy of a tape recorded conversation. It is denied that the electronic communication was intercepted and disclosed by Defendant, YOCUM, in that the use of the word disclosed is a conclusion of fact and/or law. The answering Defendant is without sufficient knowledge to form a belief as to the truth of the averment that the electronic communication in question was intercepted and, therefore, this averment is denied.

8. The averment contained in paragraph number 8 is not directed to the answering Defendant, and, therefore, no response is necessary.

9. The averment contained in paragraph under 9 is not directed to the answering Defendant, and, therefore, no response is necessary.

10. After reasonable investigation the answering Defendant is without sufficient knowledge or information to form a belief as to the truth of the averment set forth in this paragraph and, therefore, these averments are denied.

III. THE ILLEGAL ACTIVITY

11. The averment contained in paragraph 11 is not directed to the answering Defendant and, therefore, no answer is necessary.

12. After reasonable investigation, the answering Defendant is without sufficient knowledge to form a belief as to the truth of the averments set forth in this paragraph and, therefore, these averments are denied.

13. Denied. After reasonable investigation, the answering Defendant is without sufficient knowledge to form a belief as to the truth of the averments set forth in this paragraph and, therefore, these averments are denied.

14. Denied. After reasonable investigation, the answering Defendant is without sufficient knowledge to form a belief as to the truth of the averments set forth in this paragraph and, therefore, these averments are denied.

15. Denied in part. Admitted in part. It is admitted that at some point prior to September 30, 1993, YOCUM received a tape of a conversation from an unknown and anonymous source. With respect to the averment that such tape was surreptitiously recorded the answering Defendant, after reasonable investigation, is without sufficient knowledge to form a belief as to the truth of this averment and, therefore, same is denied. The averment that YOCUM intentionally disclosed the tape to several individuals and media sources is a conclusion of fact and/or law with respect to the use of the term disclosed and same needs no response. It is admitted that YOCUM provided to the Defendant, VOPPER, a copy of the tape recorded conversation. The averment that the various allegations contained in paragraph 15 relating to various acts were performed without the permission, knowledge or consent of the Plaintiffs is an averment that is denied for the reason that after reasonable investigation, the answering Defendant is without sufficient knowledge to form a belief as to the truth of the averment set forth and, therefore, said averment is denied.

16. Paragraph 16 contains averments not directed to the answering Defendant and, therefore, no answer is required.

17. Denied. The averments in paragraph 17 constitute conclusions of fact or law which are denied without the necessity of a responsive pleading.

18. Paragraph 18 contains averments not directed to the answering Defendant and, therefore, no response is necessary.

COUNT I—VIOLATION OF 18 U.S.C. § 2510, et seq.

19. Paragraphs one through 18 of the foregoing Answer are incorporated herein by reference thereto with the same force and effect as if set forth here at length.

20. Denied. The paragraphs set forth in paragraph 20 constitute conclusions of law and same are denied and no response is necessary.

21. Denied. The paragraphs set forth in paragraph 21 constitute conclusions of law and same are denied and no response is necessary.

22. It is denied that the answering Defendant has engaged in any unlawful activity and it is further denied that the Plaintiffs have suffered any actual damages as a result of any alleged action on the part of the answering Defendant.

23. Denied. Plaintiffs state a conclusion of law which is denied and no response is necessary.

24. Denied. Plaintiffs state a conclusion of law which is denied and no response is necessary.

25. Denied. Plaintiffs state a conclusion of law which is denied and no response is necessary.

WHEREFORE, answering Defendant, JACK YOCUM, respectfully requests that your Honorable Court enter judgment in his favor and against the Plaintiffs.

COUNT II—VIOLATION OF 18 Pa. C.S. § 5701, et seq.

26. The answers contained in paragraphs one through 25 of this Answer are incorporated herein by reference with the same force and effect as if set forth here at length.

27. It is specifically denied that the answering Defendant's actions constitute an unlawful disclosure and use of electronic communications. Additionally, the averments in paragraph 27 are denied in that they constitute a conclusion of law which are denied and no response is necessary.

28. Denied. The allegations set forth in paragraph 28 constitute conclusions of law which are denied and no response is necessary.

29. It is specifically denied that the answering Defendant, JACK YOCUM, engaged in any unlawful actions and it is further denied that Plaintiffs have suffered actual damages as a result of any alleged conduct on the part of the answering Defendant.

30. Denied. Plaintiffs state a conclusion of law which is denied without the necessity of a response.

31. Denied. Plaintiffs state a conclusion of law which is denied without the necessity of a response.

32. Denied. Plaintiffs state a conclusion of law which is denied without the necessity of a response.

WHEREFORE, Defendant, JACK YOCUM, respectfully requests that your Honorable Court enter judgment in his favor and against the Plaintiffs.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint should be dismissed because it fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs in this case had no reasonable expectation of privacy with respect to a conversation carried on over a cellular telephone and, therefore, their claim must fail since they have no cause of action against the answering Defendant.

THIRD AFFIRMATIVE DEFENSE

The answering Defendant, JACK YOCUM, has a defense of privilege since the conversation in question contained threats of potential grievious bodily harm or damage to property made by teacher union members and directed against school directors. The answering Defendant provided a copy of the conversation to the investigative news media for the purpose of protecting any possible board member or other individuals from bodily harm. Answering Defendant's conduct in this regard was patently reasonable and, in fact honorable. The matter was one of serious public concern and the answering Defendant, JACK YOCUM, was privileged to provide a copy of the tape to the news media.

FOURTH AFFIRMATIVE DEFENSE

Inasmuch as Plaintiffs have now stipulated that there were no actual damages which resulted from the alleged acts of any Defendants in this matter, and further, that no averments have been made against Defendant, YOCUM, which would constitute grounds upon which punitive damages could be awarded, no valid claim arises for such.

FIFTH AFFIRMATIVE DEFENSE

Any action taken by the answering Defendant in this case is an act that is protected by the First Amendment and is not subject to penalty under the state or federal statutes recited by the Plaintiffs in their Complaint.

Respectfully submitted,

/s/ Frank J. Aritz, Esquire
FRANK J. ARITZ, ESQUIRE
CHARLES GEROW, ESQUIRE
Counsel for Defendant, JACK YOCUM
23 West Walnut Street
Kingston, PA 18704
(717) 288-9751

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:94-CV-01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,

Plaintiffs

-v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,

Defendants

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Defendants, FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, and LACKAZERNE, INC., d/b/a WGBI RADIO, by and through their attorneys, Rosenn, Jenkins & Greenwald, L.L.P., hereby submit the instant Statement of Undisputed Material Facts in connection with their Motion for Summary Judgment and aver as follows:

1. In or about May, 1993, BARTNICKI had telephoned KANE using her cellular telephone to discuss the ongoing contract negotiations and labor dispute between the Wyoming Valley West School Teachers' Union and School Board during which KANE stated to BARTNICKI that it may be necessary to blow off the front porches of some of the school directors in order to get the school directors to agree to what the teachers wanted.

2. Someone unknown intercepted and tape recorded this cellular telephone conversation.

3. At the time the cellular telephone conversation took place, there had been pending for a period of over a year a bitter labor dispute and contract negotiation between the Wyoming Valley West School teachers and the School Board; this dispute and these negotiations had been highly publicized in both the electronic and print media.

* * * *

5. Defendant, YOCUM, was the leader of the Taxpayers' Group which had opposed the position taken by the Teachers' Union in its contract negotiations with the Wyoming Valley West School District.

6. Subsequently, Defendant, YOCUM, delivered on his own volition a copy of the tape to the office of WILK RADIO.

7. Defendant, YOCUM, also delivered copies of the tape to other members of the media.

8. Other members of the media, including a television station, also played portions of the aforesaid tape of the cellular telephone conversation, and the newspapers quoted from said tape in news stories pertaining thereto.

9. Sometime after the tape had been delivered, WILK played the entire tape, and portions thereof, during the radio broadcast of the FRED WILLIAMS' show on WGBI-910 AM and WILK-980 AM RADIO in about October of 1993.

10. A true and correct copy of the transcript of the cellular phone conversation of the tape played on the FRED WILLIAMS' show is attached hereto as Exhibit "A".

11. The tape was played in the context of the FRED WILLIAMS' news-talk show which addressed the issue of the highly publicized teacher dispute and contract negotiations between the Wyoming Valley West School District and Wyoming Valley West Teachers' Union.

12. Contract negotiations between the Teachers' Union and the Wyoming Valley West School District had received at that time and continued to receive thereafter a high degree of publicity in both the electronic and print media.

* * * *

Respectfully submitted,

ROSENN, JENKINS & GREENWALD, L.L.P.

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Attorneys for Defendants,
KEYMARKET OF NEPA, INC., d/b/a
WILK RADIO, FREDERICK W. VOPPER,
a/k/a FRED WILLIAMS, and
LACKAZERNE, INC., d/b/a WGBI RADIO

[Letterhead Imprints Omitted]

TONY KANE AND GLORIA BARTNICKI
CELLULAR PHONE CONVERSATION

KANE-...So there's no...No problem. We're gonna...Tomorrow we're passing out information...You know that thing about moving the, the, things up? The, uh, the exams up?

BARTNICKI- Yes.

KANE- That we can have a strike almost any time

BARTNICKI- Uh huh.

KANE- Boy (INDECIPHERABLE), That hit uh, Norm and them today. They found...

BARTNICKI- (INTERRUPTS) Well tell me...Why, what happened?

KANE- Well, they, they were called, they, they, uh, they uh, were calling uh Harrisburg in the afternoon and they thought we had a leak...(laughs) uh...A speaker in the office. But I says no, this thing was decided by Gloria and myself...(INDECIPHERABLE)...Gonna notify the teachers. It was just a coincidence. You were right on target. They can move the date, and they might want to try to move the date.

BARTNICKI- See, when I talked to him today...

KANE- Yeh.

BARTNICKI- He did not say it but...He left me with that impression.

KANE- (INTERRUPTS) Ah, you were, you had the right intuition. But at this point in time, when I talked to him... We may have to set a strike date uh, ah, early next week.

BARTNICKI- Yeh, we might Tony.

KANE- So I'll be in close contact with you tomorrow.

BARTNICKI- Okay.

KANE- Ah...I'll, I'll call you at home or call the office and tell them to call er (INDECIPHERABLE) meet you right away.

BARTNICKI- Yeh, definitely.

KANE- But I'll find out what I hear tonight. Now (PAUSE) give me your number at home again because you did not give it to me.

BARTNICKI- (INDECIPHERABLE)...Five, five

KANE- You're at home, are you not?

BARTNICKI- No I'm in my car right now.

KANE- Oh, okay...But

BARTNICKI- ...Going back to the office for fifteen...About five minutes and then I'm going home.

KANE- Well now, give me your car...and home...

BARTNICKI- Okay. The car...

KANE- (INTERRUPTS) Now wait a minute. Gloria...

BARTNICKI- The car...

KANE- ...Car, right?

BARTNICKI- Six, five, zero...

KANE- Six, five...

(WHOEVER TAPED CONVERSATION WARPED THE PHONE NUMBER SO IT IS NOT HEARD)

BARTNICKI- Zero

KANE- One, zero. Okay home...

BARTNICKI- Six, five, five, one, six...

(TAPE IS ONCE AGAIN WARPED DURING PHONE NUMBER SO IT IS INDECIPHERABLE)

KANE- Six, five, five...

(TAPE WARPED HERE ONCE AGAIN TO PROTECT THE PHONE NUMBER)

KANE- The car is six, five...

(TAPE WARPED AGAIN, NUMBER INDECIPHERABLE)

KANE- Okay, what I'll do is, I (MUMBLES)... They, according to this reporter, they're supposed to get in touch with me. But my answers (?), I got in touch with, the school got in touch with me, but I'm hoping to hear from Mr. Paley.

BARTNICKI- Yeh, now listen. Let me ask you something. (PAUSE) Are you guessing that they called the Department of Education...

KANE- No (QUIETLY), between you and me, this is very confidential...

BARTNICKI- Yes.

KANE- Andy Marko (SP?) told me that they called this afternoon...

BARTNICKI- Yes.

KANE- And the department said yes, they could move the date of the exam...

BARTNICKI- Yeh.

KANE- Now that had nothing to do with how short school is gonna be.

BARTNICKI- That's right.

KANE- Okay?

BARTNICKI- Uh huh.

KANE- And when they did that...

BARTNICKI- (INTERRUPTS) Even if they take the exams tomorrow, Tony, the kids still have to have a hundred and eighty days.

KANE- They still have to have a hundred and eighty days, but I don't think they can have exams tomorrow. I don't think the teachers would go through with it.

BARTNICKI- No.

KANE- They haven't prepared the kids for it. They have to tell the kids to study.

BARTNICKI- Yes. That's right.

KANE- ...Right?

BARTNICKI- That's right.

KANE- At least get them going for it.

BARTNICKI- Yeh...

KANE- That would be grossly unfair too...So what I'm saying, they thought that there was some kind of a leak, because at a quarter of three the high school principal called and said there was a rumor going around that the teachers were talking about that, that, that (STUTTERS)... Test date being moved back.

BARTNICKI- Oh, really?

KANE- And it was just that we had, I had started that this morning after talking to you...

BARTNICKI- Oh, okay.

KANE- Your suspicions, I said to everybody, pass the word that we never know, but the principals were meeting this morning and they may be trying to move back.

BARTNICKI- Yeh.

KANE- Which they were not!

BARTNICKI- Yeh.

KANE- They, they're meeting on Friday to discuss that ...From what I understand.

BARTNICKI- Uh huh.

KANE- You understand? It was just a coincidence.

BARTNICKI- So, if they meet on Friday, Tony, the earliest they can tell the kids is Monday.

KANE- (INDECIPHERABLE)...They're, they're gonna have it then.

BARTNICKI- Yeh...Exactly.

KANE- But when...Monday there's no school.

BARTNICKI- Oh, that's right. (PAUSE) So Tuesday...

KANE- They'd have to tell the kids they're gonna have a test on Tuesday.

BARTNICKI- Yeh.

KANE- (PAUSE) Right?

BARTNICKI- If that happens, then we strike them Tuesday, Tony.

KANE- Right...That's...

BARTNICKI- Yeh.

KANE- Uh, I guess we have to wait until they make the next move.

BARTNICKI- Yeh. Then we strike them Tuesday.

KANE- Right.

KANE- All right...Okay. That will be the way, whether they're...

BARTNICKI- (UNDECIPHERABLE FIRST NAME) Fumanti told me that Norm Namey called him today.

KANE- Yeh.

BARTNICKI- He was beside himself.

KANE- Yeh, well I feel sorry for Norm.

BARTNICKI- I know. I do, too.

KANE- Because I don't think this should be.

BARTNICKI- No.

KANE- I don't think this should be...But this is again...It's, it's (UNDECIPHERABLE)...If they're not gonna move for three percent, we're gonna have to go to their, their homes...To blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news. (UNDECIPHERABLE) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said "We'll meet, we'll meet and discuss this." You don't discuss the items in public.

BARTNICKI- No.

KANE- You don't discuss this in public...Particularly with the press.

BARTNICKI- Exactly...Well, but now, uh, all rules are off and they'll discuss anything they want.

KANE- Yeh, well if the rules are off, the rules are off for us, too.

BARTNICKI- Exactly.

KANE- The rules are off for us, too. So, if you want to get beat over the head, too, get beat over the head.

BARTNICKI- Yes.

KANE- But what they should have done is said-Look, we'll meet tomorrow and see if we can't resolve...But you don't discuss your position openly...

BARTNICKI- No.

KANE- You say no...Buy you know they're saying no and they, the taxpayers, love it.

BARTNICKI- Yes.

KANE- See? Under no circumstances, people with enough sense to say (UNDECIPHERABLE)...these idiots

BARTNICKI- I know.

KANE- It's not what they're to do.

BARTNICKI. That's right.

KANE- You see the media goes and he tries to talk to them in private, but they're doing everything in public...So we have to talk about the humming that took place at the school.

BARTNICKI. Yes.

KANE- (UNDECIPHERABLE) You know we're gonna buy him a song sheet.

BARTNICKI- Yes.

KANE- You know...And we can put words to his songs the next time instead of humming. Put some nice words to it.

BARTNICKI- That's, that's how seriously he took this.

KANE- That's right. And that's how serious the whole question might be...They're, they're, they're nitwits. But, I'll tell you I think there, there's eight or nine of them.

BARTNICKI- Oh yeah!

KANE- That's the sad part.

BARTNICKI- Oh yeah...

KANE- See...

BARTNICKI- And you know, Tony, I'm gonna say this to you. I don't think George Dervinis is assertive enough with them. I just don't.

KANE- No... Well, well, I don't think he...

BARTNICKI- He's too nice a guy, Tony.

KANE- Yeh, I think he tells them, but then they say well the hell with you...You've got the rabble rousers, like Jim Burns...See if that were Vivian he'd fight with them.

BARTNICKI- Yeh.

KANE- See they wouldn't push him over...He'd fight with them, he'd argue with them.

BARTNICKI- Yeh, yeh.

KANE- But I don't think the others have the energy to do it...

BARTNICKI- No. No.

KANE- Yeh...So that's...

BARTNICKI- Okay kiddo...

KANE- (UNDECIPHERABLE) If I hear from the school tonight...I'll definitely call you.

BARTNICKI- Alright.

KANE- I'll definitely call ya..Now maybe, I won't...

BARTNICKI- Okay.

KANE- But I think I might hear from someone.

BARTNICKI- Alright.

KANE- Okee-Doke.

BARTNICKI- Okay

KANE- Right.

BARTNICKI- Bye.

KANE- Bye-bye.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:94-CV-01201
Judge Edwin M. Kosik

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,

Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE, and JOHN DOE, and JACK YOCUM,

Defendants

STATEMENT OF MATERIAL FACTS
AS TO WHICH DEFENDANT JACK YOCUM
CONTENDS THERE
IS NO GENUINE ISSUE TO BE TRIED

* * * *

11. In addition to WILK Radio, the contents of the conversation between Plaintiffs was aired on several other media outlets throughout the area.

12. In addition to electronic media airing the contents of the communication between plaintiffs, various newspapers and print media also diseminated the contents in transcript form.

* * * *

14. Plaintiffs have admitted that they have sustained no actual damages as a result of the conduct of any of the defendants and have withdrawn their claims for actual damages.

These facts are supported by materials which are already on file with the Court.

In addition, other materials in support of the above Statement will be filed with the Court within the time provided by the Rules.

Respectfully submitted,

/s/ Charles R. Gerow, Esquire
CHARLES R. GEROW, ESQUIRE
Attorney for Jack Yocum
Attorney I.D. #32888
4725 Charles Road
Mechanicsburg, PA 17055
(717) 975-3536

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:94-CV-01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,

Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, AND JACK YOCUM,

Defendants

MEDIA DEFENDANTS' ANSWER TO DEFENDANT'S, JACK YOCUM, STATEMENT OF MATERIAL FACTS

The Defendants, FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, and LACKAZERNE, INC., d/b/a WGBI RADIO (referred to collectively as the "MEDIA DEFENDANTS"), by and through their attorneys, Rosenn, Jenkins & Greenwald, L.L.P., hereby submit the instant Answer to the Statement of Material Facts submitted by the Defendant, JACK YOCUM, in support of his Motion for Summary Judgment and aver as follows:

* * * *

11. ADMITTED.

12. ADMITTED.

* * * *

14. ADMITTED.

Respectfully submitted,

ROSENN, JENKINS &
GREENWALD, L.L.P.

BY: /s/ Donald H. Brobst,
DONALD H. BROBST, ESQ.

BY: /s/ James C. Oschal
JAMES C. OSCHAL, ESQ.
15 South Franklin Street
Wilkes-Barre, PA 18711-0075
(717) 826-5600
Attorneys for Defendants,
KEYMARKET OF NEPA, INC.,
d/b/a WILK RADIO, FREDERICK
W. VOPPER, a/k/a FRED
WILLIAMS, and LACKAZERNE,
INC., d/b/a WGBI RADIO

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3: CV-94-1201

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,
Plaintiffs

vs.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,
Defendants

CIVIL ACTION
JURY TRIAL DEMANDED
(JUDGE KOSIK)

AFFIDAVIT

JACK YOCUM, being duly sworn according to law, does depose and say the following relative to the above captioned action:

1. That at the time I received the tape which is the subject of this lawsuit and all times subsequent thereto, I was completely unaware of the individual or individuals who made the tape;

2. I was at the time of the receipt of the tape and all times subsequent thereto without any personal knowledge that the conversation was a telephone conversation;

3. I have no knowledge that the tape was made illegally or surrepticiously and I have no knowledge as to the manner in which the tape was made or for what purpose it was made;

4. I have no knowledge that the recording of the conversation was intentional. I have reason to believe based upon information I have received during Discovery in this case, by way of deposition testimony and other evidence, that this tape was inadvertently made and was a random act.

5. I was, at the time that I received the tape, totally unaware of any of the provisions of the State or Federal Statutes upon which Plaintiffs' claim is based.

6. I made no effort to investigate the source of the tape, the legality of the tape and took the tape the very next morning to a radio station for the purpose of having same reviewed by an investigative reporter.

7. Based upon prior experience with the police, I did not believe that the police would act upon the tape without some overt act having been done, i.e. an actual explosion, bombing or other act of violence.

8. I had a real and extreme concern for the safety of the school board members and/or others and reasonably believed that by having the tape investigated and publicized this would prevent a violent act, i.e. bombings, since other bombing threats had been made to school board members. Additionally, I was aware that Annette Palutis, PSEA President, had advocated breaking the law if it was necessary to secure a contract settlement and, additionally, personal threats had been made against me.

Sworn to and subscribed
before me this 30th
day of October, 1995.

/s/ Jane N. Artis
JANE N. ARTIS

/s/ Jack Yokum
JACK YOKUM

[Seal Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:94-CV-01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,
Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,
Defendants

PLAINTIFFS' RESPONSE TO THE STATEMENT OF UNDISPUTED MATERIAL FACTS OF FREDERICK W. VOPPER, KEYMARKET OF NEPA, INC. and LACKAZERNE, INC.

The Plaintiffs, Gloria Bartnicki and Anthony F. Kane, Jr., by and through their counsel Koff, Wendolowski, Ferguson & Mangan, P.C., hereby respond to the Statement of Undisputed Material Facts in connection with the Motion for Summary Judgment asserted by Frederick W. Vopper, Keymarket of NEPA, Inc. and Lackazerne, Inc., as follows:

1. Admitted in part and denied in part. It is admitted that in or about May, 1993 Bartnicki did telephone Kane using her cellular telephone. Part of that conversation was intercepted and recorded and a transcript of the recording has been submitted as Exhibit 1 in support of Plaintiffs' Motion for Summary Judgment. Kane's statement is taken out of the context of the entire

conversation. Kane's reference to the need "to blow off the front porches of the school directors" in order to get the school directors to agree to the teachers' demands is purely rhetoric and a figure of speech.

2. Admitted.

3. Admitted.

* * * *

5. Admitted.

6. Admitted in part and denied in part. While it is admitted that Yocum did deliver a copy of the tape to WILK, Plaintiffs are without sufficient information and knowledge so as to determine the truth of the rest of the statement in Paragraph 6 and therefore the rest of the statement is denied and strict proof of same is demanded at time of trial.

7. Admitted.

8. Admitted. While it is admitted that other members of the media played portions of the tape and that newspapers quoted from the tape in their news stories, this occurred in response to Mr. Vopper's playing of the tape on his show.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

* * * *

Respectfully submitted,

KOFF, WENDOLOWSKI, FERGUSON
& MANGAN, P.C.

By: /s/ Raymond P. Wendolowski,
RAYMOND P. WENDOLOWSKI, ESQUIRE

By: /s/ Cynthia R. Vullo,
CYNTHIA R. VULLO, ESQUIRE
22 East Union Street-Suite 115
Wilkes-Barre, PA 18701-2721
(717) 822-5600
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:94-CV-01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,

Plaintiffs

v.

FREDERICK W, VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,

Defendants

PLAINTIFFS' RESPONSE TO THE STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT, JACK YOCUM, CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

* * * *

11. Admitted. It is admitted that other media outlets played portions of the tape, however, this occurred in response to Mr. Vopper's playing of the tape on his show.

12. Admitted in part and denied in part. It is admitted that newspapers printed portions of the tape, however, this occurred in response to Mr. Vopper's playing of the tape on his show. Plaintiffs are without sufficient information or knowledge to admit or deny that the contents of the tape were disseminated in transcript form in the print media.

* * * *

14. Denied as stated. Plaintiffs stipulated to withdrawing their claim for actual damages, but have not admitted that they have no such damages.

Respectfully submitted,

KOFF, WENDOLOWSKI, FERGUSON
& MANGAN, P.C.

By: /s/ Raymond P. Wendolowski,
RAYMOND P. WENDOLOWSKI, ESQUIRE

By: /s/ Cynthia R. Vullo,
CYNTHIA R. VULLO, ESQUIRE
22 East Union Street-Suite 115
Wilkes-Barre, PA 18701-2721
(717) 822-5600
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 3:94-CV.-01201
Judge Edwin M. Kosick

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE, AND JOHN DOE, AND JACK YOCUM,
Defendants

DEFENDANT JACK YOCUM'S ANSWER TO MEDIA DEFENDANTS' STATEMENT OF MATERIAL FACTS

The Defendant, Jack Yocum, by and through his attorney, Charles R. Gerow, Esquire, hereby submits the instant Answer to the Statement of Material Facts submitted by the Media Defendants', in support of his Motion for Summary Judgment and aver as follows:

1. ADMITTED.

2. ADMITTED.

3. ADMITTED.

* * * *

5. ADMITTED.

6. ADMITTED.

7. ADMITTED.

8. ADMITTED.

9. ADMITTED.

10. ADMITTED.

11. ADMITTED.

12. ADMITTED.

* * * *

Respectfully submitted,

By:/s/ Charles R. Gerow
CHARLES R. GEROW, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

USDCMDPA Case No. 3 :94CV01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,

Plaintiffs

vs.

FEDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, and JACK YOCUM,

Defendants

PETITION FOR PERMISSION TO APPEAL

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO. and LACKAZERNE, INC., d/b/a WGBI RADIO, the Media Defendants, by and through their attorneys, ROSENN, JENKINS & GREENWALD, L.L.P., hereby petition this Court pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure for permission to appeal pursuant to the Certification Order entered on January 7, 1998 by the United States District Court for the Middle District of Pennsylvania, a copy of which Order, together with the Opinions related thereto dated June 17, 1996 and November 8, 1996, is annexed to this Petition as Exhibit "A". The Defendants Petition to appeal the Memorandum and Order dated June 14, 1996 denying the Motion for Summary Judgment of the Defendants and the Memorandum and Order of November 8, 1996 which denied the Defendants' Motion to Reconsider the June 17, 1996 decision. Copies of the

aforesaid Court Memoranda and Orders are annexed to this Petition as Exhibit "A". .

1. The facts necessary to an understanding of the controlling question of law determined by the District Court's Opinions and Orders are as follows:

(a) Plaintiff, GLORIA BARTNICKI, is employed by the Pennsylvania State Education Association (PSEA) and was assigned as a negotiator on behalf of the Teachers' Union in a dispute between the Teachers' Union and Wyoming Valley West School District.

(b) Plaintiff, ANTHONY F. KANE, JR., was a teacher at Wyoming Valley West High School and President of the PSEA's Local Teachers' Union representing the teachers of the School District.

(c) During the pendency of the negotiations between the Teachers' Union and the School Board, a citizens group, Wyoming Valley West Taxpayers Association ("Association") was formed for the purpose of opposing the Teachers' Union's proposals. Defendant, JACK YOCUM, was President of the Association.

(d) The School District-Teachers' Union contract negotiations received extensive local media coverage.

(e) In May of 1993, Plaintiffs, BARTNICKI and KANE, had a telephone conversation via a transmission from Plaintiff BARTNICKI's cellular car phone and Plaintiff KANE's conventional telephone line in which the two of them discussed the Teachers' Union's demands and the negotiations.

(f) During that telephone conversation, KANE stated to BARTNICKI the following: "If they're [the School Directors] not going to move for 3%, we're gonna have to go to their homes. . . . to blow off their front porches, we'll have to do some work on some of those guys . . .".

(g) The aforesaid conversation, including the aforesaid statement by KANE to BARTNICKI, was intercepted and recorded by an unidentified party.

(h) A cassette containing a recording of this conversation was placed in Defendant YOCUM's mail box without any markings identifying the depositing party or the person who made the recording.

(i) Defendant YOCUM played the tape and recognized the voices of those belonging to the Plaintiffs.

(j) Defendant YOCUM delivered to Defendant VOPPER of Defendant WILK's Radio Station the tape recording.

(k) Mr. VOPPER, who has a radio news/public affairs talk program using the name FRED WILLIAMS, aired the tape during his program several times, thereby causing it to be broadcast over WILK RADIO, which is owned by KEYMARKET OF NEPA, and said program was simulcast over WGBI AM, which is owned by LACKAZERNE, INC.

(l) None of the Defendants played any role whatsoever with respect to the interception or taping of the cellular telephone communication between the Plaintiffs.

(m) The Plaintiffs seek to impose liability on the Media Defendants solely for playing the newsworthy tape during the radio news/public affairs talk show of Defendant FRED WILLIAMS on WILK RADIO and WGBI/AM RADIO.

(n) The Plaintiffs seek to impose liability on Defendant YOCUM solely for delivering the tape to the media.

(o) It is unknown who intercepted or recorded the conversation and delivered the tape to Defendant YOCUM.

* * * *

ROSENN, JENKINS & GREENWALD, L.L.P.

By: /s/ Donald H. Brobst,
DONALD H. BROBST, ESQUIRE
Attorney I.D. No. 17833
15 South Franklin Street
Wilkes-Barre, PA 18711-0075
(717) 826-5655

Attorneys for Defendants,
FREDERICK W. VOPPER, a/k/a FRED WILLLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, and LACKAZERNE, INC., d/b/a WGBI RADIO

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

USDCMDPA Case No. 3:94CV01201
JUDGE KOSIK

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,
Plaintiffs

vs.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,
Defendants

DEFENDANT JACK YOCUM'S ANSWER TO PETITION FOR PERMISSION TO APPEAL

Individual Defendant, JACK YOCUM, by and through his counsel, FRANK J. ARITZ, ESQUIRE hereby files this Answer pursuant to Federal Rules of Appellate Procedure 5(b) and states as follows;

1. Defendant, YOCUM, concurs in the Media Defendants' Petition for permission to appeal . . . .

Respectfully submitted,

/s/ Frank J. Aritz,
FRANK J. ARITZ, ESQUIRE
Counsel for Defendant, YOCUM
23 West Walnut Street
Kingston, PA 18704
(717) 288-9751
Atty. I.D. No. 27779

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

USDCMDPA Case No. 3:94CV01201
(Judge Kosik)

GLORIA BARTNICKI and
ANTHONY F. KANE, JR.,
Plaintiffs

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS, KEYMARKET OF NEPA, INC., d/b/a WILK RADIO, LACKAZERNE, INC., d/b/a WGBI RADIO, JANE DOE and JOHN DOE, and JACK YOCUM,
Defendants

ANSWER OF PLAINTIFFS, GLORIA BARTNICKI and ANTHONY F. KANE, JR. TO PETITION FOR PERMISSION TO APPEAL

Gloria Bartnicki ("Bartnicki") and Anthony F. Kane, Jr., ("Kane"), Plaintiffs, by and through their attorneys, Koff, Wendolowski, Ferguson & Mangan, P.C. hereby respond to the Petition to Permission to Appeal of the Media Defendants and state as follows:

1a. through 1m. Admitted.

1n. Admitted in part and denied in part. It is admitted that the Plaintiffs seek to impose liability on the Defendant Yocum for delivering the tape to the Media Defendants. By way of further answer, Plaintiffs also seek to impose liability upon Yocum for delivery of the tape to other, non-media, entities who are not parties to this litigation.

1o. Admitted.

* * * *

Respectfully submitted,

KOFF, WENDOLOWSKI, FERGUSON
& MANGAN, P.C.

By: /s/ Raymond P. Wendolowski, Esquire
RAYMOND P. WENDOLOWSKI, ESQUIRE
Attorney I.D. No. 40935
22 East Union Street, Suite 115
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(717) 822-5600

Attorneys for Plaintiffs, Gloria Bartnicki and
Anthony F. Kane, Jr.

TRANSCRIPTS OF DEPOSITIONS TAKEN IN *BARTNICKI V. VOPPER*, NO. 3:CV-94-1201 (M.D. PA.)

Deposition Testimony of Gerald Getz, December 29, 1994

[9] By Mr. Wendolowski [Attorney for Plaintiffs]:

* * * *

Q. And you are Vice President and General Manager of both WILK and WGBI?

A. Correct.

* * * *

[14]

* * * *

Q. Did you have discussions with him at that time about what you were looking for in a radio talk show host; what type of air personality you wanted; what type of show you wanted presented?

A. I mean, I probably did. I mean, I'm sure that was brought up. And I don't know exact questions I would have asked him at the time but basically someone who'd come in and be involved in local community public concerns and we wanted a—basically a sort of a local Rush Limbaugh show from—at that time it was nine to noon, for three hours.

* * * *

[38]

* * * *

Q. So it would be fair to say that from your company's perspective the way you look at The Fred [39] Williams Show, the ratings are okay?

A. Yeah, they're okay and it's basically fulfilling our community service public needs, which we always like to do

in our career, because we get—our license renewal comes up quite often and what it does, it provides a real public interest program, which keeps us and fulfills a lot of federal, you know, guidelines that we have to be providing that kind of service to the public. And it does that very much because of the content of the show. So that's more of our concern than anything.

* * * *

Deposition Testimony of Defendant Frederick W. Vopper, December 29, 1994

[7] By Mr. Wendolowski [Attorney for Plaintiffs]:

* * * *

Q. Mr. Vopper, can you briefly describe for us your educational background?

A. I went to the 11th grade. I left school to help my parents in their business. Then shortly thereafter, I entered the United States Navy. I became a radio communications operator. Ended up my career at the naval—Norfolk Naval Base in Norfolk, Virginia. And that's how I got into broadcasting and writing and being in the news department, covering hurricanes, news events of that nature. And then I went to their sister stations in Petersburg, Virginia; gravitated to Pennsylvania.

I went to Philadelphia WCAU for a period of years and then I stayed in Lebanon, Pennsylvania for about ten years and there was an interim job in Harrisburg—sister station to Williamsport, Virginia—Williamsport, Pennsylvania, and then that's when Keymarket approached me to come to Wilkes-Barre in about 1990, and I've been there ever since.

* * * *

[8]

* * * *

Have you ever been involved in any disputes over taped conversations before?

A. No.

* * * *

[17]

* * * *

Q. Let me ask you first. When did you first [18] get a copy of the tape?

A. To the best of my recollection, between April and May of '93.

Q. And where did you get the tape from, the copy that you received?

A. I got it from Jack Yocum who delivered it to the radio station.

Q. Let me ask you another question. When is the first time you heard the tape?

A. I didn't listen to the tape immediately and I can't tell you precisely whether it was a week, two weeks or when I actually listened to this tape. I don't remember.

Q. You had never heard it before Mr. Yocum gave you a copy of it?

A. That's correct.

Q. Did you know it existed before Mr. Yocum dropped the copy off at the station?

A. No, I did not.

Q. Did you have any conversation with Mr. Yocum at the tine he gave you the tape?

A. Yeah. I asked him where he got it.

Q. And what did he say?

A. He said he found it in his mailbox.

Q. Any other discussion with him at that time?

[19] A. No. I just—I was kind of curious because it was—I think the whole tape is only about, I guess, nine minutes or ten minutes in length and I was kind of curious. He found it in his mailbox. I said, well, do you know who did

this, who recorded it? He says, I don't know. So that basically was it.

Q. Did you have any discussion as to who was on the tape?

A. He told me who he thought was on the tape.

Q. And what did he tell you?

A. Ms. Bartnicki and Mr. Kane.

Q. Did he tell you how he surmised that it was Ms. Bartnicki and Mr. Kane?

A. He said he recognized Mr. Kane's voice.

Q. Did he tell you anything about this being a cellular conversation?

A. He mentioned it was a cellular phone conversation.

Q. Did he tell you how he knew that?

A. No.

Q. Did you ever find out from anyone else how—first of all, do you know whether or not it was a cellular conversation?

A. I think by listening to the content of it, Ms. Bartnicki said she was driving her car at the [20] time. So it has to be a cellular phone.

Q. Have you had any discussions with anyone else about whether or not it was a cellular conversation, other than your lawyer?

A. No.

Q. Was anyone else present when you had this initial discussion with Mr. Yocum when he gave you the tape?

A. No, I think he was in my office for about ten minutes at the most. I don't think anybody was there.

Q. Who is Mr. Yocum, by the way?

A. I think he's an independent contractor. He like builds homes and refurbishes homes and puts in new bathrooms and stuff like that. He's in construction, yeah.

Q. Does he have any connection to the dispute that was going on in the Wyoming Valley West School District?

A. I don't know whether he's still the--with regards to the Taxpayer Association, but he's very involved in that, I know. Whether he's still the president of Wyoming Valley West, I don't know, but he's very active in taxpayer issues.

Q. Now, you played the tape for the first time [21] you think maybe a week later. Was anyone else present when you played it the first time?

A. I think Nancy Kman, our news and program director, was in on this. I said, Nancy, listen to this, and I think she was there. But no one else that I could think of.

Q. Okay. And when's the next time that you played the tape?

A. I don't remember. It was pretty close to probably—I think it was just put in a drawer for a while. We didn't do anything with it. And then in the month of September, we started to be concerned about maybe this is really a legitimate news item that should be looked at.

* * * *

[24]

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Q. Did you ever find out how the tape was made, how the original interception of this conversation took place?

A. I don't know how it was taped. I hear—Jack told me, only hearsay what he would know, that he heard from

somebody who told him that somebody was listening to a Bearcat scanner-type device where you could record conversations if you were zeroed in on the specific frequency of a telephone. And they heard this conversation, as the story goes, and somebody pressed down a button on a record unit that activated this tape with the conversation of these two people.

MR. BROBST: Can we have a time frame on that?

Q. When was this conversation with Yocum, the one you're just relating to me now?

A. This was probably a day or two after he gave me that tape, or maybe a week went by, and I said, Can you tell me more about it? He says, I don't know anything. I don't know who did it. He says, but I heard that somebody got it off some kind of a Bearcat scanner.

[25] Q. Did he say who he heard that from?

A. No.

Q. You didn't ask him?

A. He didn't know. I says, can you tell me who did this? He says, I don't know, this is just a rumor that I heard.

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Q Did you play it for anybody else?

A. No, I did not.

Q. Did you ever have the tape copied?

A. No.

Q. Did you ever disseminate copies of the tape to anybody?

A. No.

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[44]

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Q. Is there any reason why you didn't play the tape until September of '93 when you received it in April or May?

A. Not really, no. It was just something that [45] we listened to and somehow it got in a drawer, because I knew the ramifications of doing something that might be illegal. And it just stayed there and then we resurrected it and listened to it carefully again and Nancy and I spoke about it and talked to Gerald. I said, I think we ought to do this; I think we ought to broadcast this, but first, let's see if it's legal.

Q. And do you recall what was going on in the course of the dispute between the teachers and the school board at this time?

A. No. I don't, because it was such an ongoing thing. It was really very bad relations between the school board and the teachers union.

Q. Did you have any conversations with Mr. Yocum or anyone else at the Taxpayers' Association in September of '93 about playing the tape? Did they call you and ask you to play the tape?

A. No, as a matter of fact he didn't. He just gave it to me. He never persuaded me to play it; asked me to play it. He just gave it to me in April or May of '93. Never said, when you going to play the tape? Never said, what's going on?

Q. Before you played the tape. did you call him and alert him to the fact that you were about to play it?

[46] A. No. No one knew until the morning we played it, and that was only the audience.

* * * *

Deposition Testimony of Plaintiff Anthony Kane, Jr., December 30, 1994

[11] By Mr. Brobst [Attorney for Defendant Frederick W. Vopper, et al.]:

* * * *

Q. Is the union that represents the teachers at Wyoming Valley West the PSEA?

A. Yes.

Q. Are you or have you been in the past an officer of that union?

A. Yes.

Q. Okay. Can you tell me what positions you held and when that was?

A. Well, in Wyoming Valley West, I've been President and I became President in 1968, and I continue to serve in that capacity.

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Q. How would you describe the contract negotiations that took place between you and the School Board negotiators?

A. Extremely difficult.

Q. Why was it difficult?

A. Well, we were dealing with a party that whenever we said anything, it was reported to the press—very very difficult to operate under. We [18] couldn't operate under that. We couldn't say any—I don't know what you could say because it was being quoted in the paper. Conversation was being quoted in the paper. All our conversations, if we suggested

something to someone, it was repeated. I mean, there was no confidentiality; no semblance of respect on the part of the Board to at least understand what was going on. That's what made it difficult, extremely difficult. I don't know how you operate with that in effect.

Q. So the fact that everything was getting reported in the newspapers and the media made it difficult to conduct these negotiation; is that correct?

A. Yes.

Q. Would it be fair to say that this is a labor dispute that got a lot of media attention?

MR. WENDOLOWSKI: Object as to form. You can answer.

A. Yes, I would say yes. Very much so.

Q. So there was a lot of stories about it in the newspapers and on the television?

MR. WENDOLOWSKI: Same objection. You can answer Tony.

A. Yes.

[19] Q. Were there any work stoppages, any strikes during the course of these negotiations by the teachers?

A. There was a two-day strike that occurred in compliance with the new law which is called Act 88. There was a new bargain law in the state of Pennsylvania. It took the place of Act 195, basic part of Act 195. And it was a short—like the days were made up, nothing was lost, sort of a—we had to do this in order to proceed to the next step in the law. We were forced into it, in a sense.

Q. So it was just one two-day work stoppage?

A. Yes, that's right. It was a Friday and a Monday.

Q. And when did that occur?

A. That occurred in June.

Q. Of what year?

A. '93.

Q. '93?

A. Yeah.

Q. You indicated there was a lot of communication by the School Board representatives to the media, is that correct?

A. Yes.

Q. And what was your response to that? Did you [20] then likewise communicate to the media in order to get your side in the newspaper?

A. We attempted to get the proper perspective of the thing and we did get—whenever the press wanted to—our side of the picture into the thing.

Q. And how did you do that?

A. Well, we—many times the newspapers would call us. The reporters would call us to find out, did this really take place? And we'd say yes then try to explain it to the press. And there were some articles that tried to say that negotiations were being conducted in a fishbowl-type of atmosphere. But that's the only way that we tried to counteract it.

Q. Was there a lot of citizen involvement with respect to these negotiations?

A. Not directly to me, but a number of people went to the School Board meetings and were encouraged by one or two particular School Board members to come up and speak. They indicated that right from the stage. And there were a number of people that came to School Board meetings complaining about the negotiations.

Q. Was there any kind of an official taxpayers or citizens group that was, in effect, opposing your position?

[21] Mr. WENDOLOWSKI: Official in the sense of government sanctioned or organized?

MR. BROBST: Just organized.

A. Yes, I would say there was a group that would form on the West Side in Wyoming Valley West.

Q. And did they have a name?

A. I think they called themselves the Taxpayers Association.

Q. And what kind of activities were they involved in during the tine that these negotiations were taking place?

A. Well, one of the things they attempted to do was get petitions from the people in the district and they got as many names as they could from people and—opposing the proposal of the teachers—what they had read in the paper. They had never seen our proposal, but what was said in the papers.

* * * *

Q. I show you what's been marked as Deposition Exhibit 1, which is a newspaper article written by Fred Ney for the Citizens' Voice which appeared [22] Tuesday October 5th, 1993. Do you remember seeing that article in the paper?

A. Yes, or what appeared to be an article similar to this.

Q. And the headline on it says. "The Chasm Widens—WVW nixes arbitrator's recommendations; teachers OK it." What was that about?

A. Well, according to the law, an arbitrator was called in to try to bring the parties together. And he—Mr. Sobrick was the arbitrator from Pittsburgh—came in two or three occasions and met with us and met with the Board in private

and got information from both parties and then wrote up what he thought was a settlement that would be agreeable to both parties. And that was presented to the Board and it was presented to us and we accepted it. It wasn't everything that we wanted but it was a means of ending the conflict. And it was presented to the Board and the Board rejected it. And that's where it ended; that was the end of it.

Q. So the attempt at arbitration failed, is that correct?

A. Yes, that attempt then, yes.

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Q. Did you periodically, yourself personally, talk to newspaper reporters to give then information about the union's perspective on this matter?

A. Yes at various times, not constantly. I think that whenever I felt we tried to get the answer [24] and if there was anything incorrect. Whether they put it in or not was another.

Q. Would it be fair to say that over this 22-month period that started in January of 1992, that this dispute would—there would be times when there was more going on that would be—more activity in terms of trying to get it resolved than at other times? There were periods of activity and there were periods of inactivity?

A. Yeah, I suppose you could say that. The dynamics, the thing changed from day to day, yes.

Q. So would it be fair to say that the news coverage would—it wasn't every day during that 22-month period that there was something in the newspaper, but there would be, periodically. over that 22-month period as things occurred relating to the dispute, is that correct?

A. Yes, it was fairly regular though, fairly regular.

Q. Okay. So this got almost constant publicity during that 22-month period?

MR. WENDOLOWSKI: Object to the form. You can answer.

A. Yeah, I would say it.

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[27]

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Q. And when was the next thing that happened [28] with respect to that tape in terms of your involvement?

A. Well, that night I came home, there was another call from another newspaper. I came home from the meeting

Q. Which newspaper?

A. Citizens' Voice.

Q. And who was calling?

A. Paul Krzywicki is the reporter.

Q. What was the last name?

A. Krzywicki. I don't know if he's still working for them or not.

Q. And what was the substance of the conversation you had with him?

A. Well. I talked to the night editor first. He called me—Justin O'Donnell—and he said, do you want to know what was going on? And I said, I don't know what you're talking about. And he told me about this so-called alleged tape. And then he put me onto this reporter and the reporter repeated pretty much what Karolyi had told me, that they were in possession of a tape and—well. I talked to him a little bit.

Q. Tell me what you meant about what you said and what he said.

[29] A. Well, I made a statement. I thought it was some kind of a setup and he admitted where he got the tape—who gave it to him.

Q. Well, who did he say gave him the tape?

A. Well, Jack Yocum, the taxpayers' group. When I talked to Karolyi, I felt that's where it was coming from anyway but I have no proof of it. I didn't want to make a big thing of it, but I just suspect. That's what I said. I says, it's a setup. He admitted that he got it from this group of people, and they had—obviously they must have played it. No, I don't know if they heard it on the radio or not, but they did have the tape.

Q. Again, do you know at the tine of this conversation whether the tape had been played yet on The Fred Williams Show?

A. I really can't recall that. It was very close to that time.

Q. Did he play the tape for you—Mr. Krzywicki?

A. No, and he didn't want to.

Q. Did he tell you what was on the tape? Had he listened to it and did he tell you what was on the tape?

A. Pretty much, yeah. Karolyi was the one that [30] really wanted me to listen to it.

Q. And after he told you what was on the tape, what did you say to Mr. Krzywicki?

A. I told him I had nothing to say. I think—the newspaper article—I think you might have it there—quotes and quote on the thing, I said, I just have no comment to make. Paul Krzywicki. In fact, part of it was it bold type the first part of the article was in bold type.

Q. I don't think I have that particular article with me at this time.

A. It appeared the same time Karolyi's article appeared the next day.

Q. I was going to ask you next, was there a story in both the newspapers the next day about this tape and what was on it?

A. Yes, covered in a slightly different way.

Q. What do you mean covered in a slightly different way?

A. Well, I think The Times Leader was a little more cautious about how they reported it. They used the word 'alleged' and they did not mention names of people.

Q. They didn't put your name in it?

A. No, not until long after, I think.

[31] Q. They did eventually?

A. Yeah, but at first, as I understand it, they didn't do it.

Q. How about The Citizens' Voice?

A. I'd have to look at the clippings. They may have—yes, they mentioned the names of the people before The Times Leader.

Q. When you say the names of the people, they mentioned your name and Gloria Bartnicki's name?

A. Yeah, right, but The Times Leader did not go right out and do that.

Q. But they reported the existence of the tape and that there was certain people involved in the union who had had a conversation where they had threatened to blowup the front porches of school directors' houses?

MR. WENDOLOWSKI: Object to the form. You can answer.

A. Yes.

Q. The existence of this tape, did this get a lot of coverage in the media?

A. Yes.

Q. Was there several days of stories concerning it in the newspapers?

A. Yes.

[32] Q. Was there also coverage of the fact that there was such a tape and what it said on the television stations?

A. Yes, some stations more than others.

Q. But to your knowledge, did they all at least report something about it?

A. Yes.

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[36]

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Q. Did you hear any part of the tape played in any other either radio or television show or report?

A. Yes. One of the TV stations, that was WDAU, I believe.

Q. Channel 22?

A. Channel 22. One night I happened to be watching it—played part of my voice, they were acting as judge and jury. They played my voice on that and then a copy of my voice when I announced the strike. They didn't say anything but they had some kind of caption on there, you make the judgment. So they were asking the public to make a judgment.

Q. And you said they played part of that tape?

A. (Nods head.)

Q. Which part of the tape did they play?

[37] A. I think it was the part—

Q. Feel free to refer to Exhibit 2.

A. Back here about the porches, I believe that's what it was. And what part of the other tape they played—it was just some part when I made the announcement that there was a strike. I don't know where. They took it out of context and it—everything was taken out of context.

Q. Okay, The part that they played is, I think it's Page 7. If you look, there are small numbers—the pages are numbered. There at the bottom, is that what you're making reference to?

A. On Page 7?

Q. Yeah.

A. Yeah.

Q. On the bottom?

A. Yeah.

Q. Goes onto Page 8, top of Page 8?

A. I guess it was some part around there.

Q. The part where they said, 'If they're not going to move for three percent, we're going to have to go to their, their homes to blow off their front porches, we'll have to do some work on some of those guys.'

A. Yeah. that was the part, parts of that, that [38] section, yeah.

Q. Channel 22 played that and then were asking their viewers to phone in and comment on it or they were—what were they doing with that?

A. I only saw it once, as best I could—they played that and then they played a part of when I announced the teachers were going to go on strike.

Q. Okay.

A. And they had a caption to indicate, is this the same person, you be the judge. Something to that effect. I would never be able to remember exactly what they said.

MR. WENDOLOWSKI: Off the record for a second.

(A discussion was held off the record.) (Continued by Mr. Brobst):

Q. So this was on the 11:00 news?

A. Yeah, and I think they played it once, to my knowledge. I don't recall.

Q. And they were asking people just to listen to your voice on the tape and your voice when you announced the strike and to—they're asking their viewers to decide for themselves whether it was—

A. Yeah, you be the judge.

Q. —whether is was the same voice?

[39] A. Yeah.

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[76]

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Q. Are you aware of the fact that a cellular phone conversation can be intercepted?

A. I'm not aware of any of that.

Q. You thought that a cellular conversation was as secure as using a telephone wire?

A. Well, I just never expected it to be [77] broadcast on a radio station.

Q. Well, that's a different issue.

A. No, that's the issue I'm at. I mean, hey, everything we do is taped. I mean, I have no problem with that. Stuff is taped all the time.

Q. You mean—when you say—what's taped all the time?

A. Well, conversations.

Q. Do you mean cellular phone conversations?

A. Any type of conversation. You don't know if your line is tapped or not or how they're doing it.

* * * *

Q. Well, from the basis of your answer then, Mr. Kane, you assume no matter whether it's a cellular phone or a regular phone, that your phone conversation may be intercepted?

[78] A. I never thought of my Phone conversation being intercepted at any time, never. When I spoke on the phone, I spoke very forthright and I just say things like I'm carrying on a private conversation. I just don't expect to have it repeated by anybody.

Q. You don't expect to have it—

A. That's not even—tell you on my part, but I just don't expect that.

Q. Well, I thought you said just that previous to me, and the record will say what it says—

A. Yeah, that things are taped, yeah. I know that, but not to be broadcast on the radio.

Q. But not to be broadcast on the radio?

A. Right.

Q. So what I'm saying is, you weren't surprised that somebody had overheard the conversation but you were surprised that somebody had put it on the radio?

MR. WENDOLOWSKI: Object to the form. You can answer.

Q. Is that correct?

A. Yeah, basically, I just didn't even expect people to be taping my conversation because I didn't think it was of any interest to them. I talked to Gloria five times a day at that time on covering everything from a member not getting their dues card [79] to negotiations. I just didn't expect that to happen—that's all—any of my conversations.

Q. You didn't expect then to be broadcast on the radio?

A. No, never, never thought of that. Last thing I ever thought of. I didn't anticipate it being picked up by anybody. but I know that it can be done. They have all kind of things today. A pin that can televise you; I saw one.

Q. So what was your reaction when you found out about the fact that this tape was being broadcast on The Fred Williams show and indeed, you know, that the other media also had copies of it. What was your reaction?

A. I thought that it was sort of unfair, that the was the first thing that struck me. You know, self-concern. you know, that type of thing. And I thought it was, you know, totally taken out of context, out of the meaning of what it was supposed to be because I certainly am not a criminal. And people that know me know that. I mean. I certainly would not attempt to do such a thing.

Q. You wouldn't attempt to blow up the porches—

A. No. I'm afraid not.

[80] Q. —of even Mr. Warman's porch?

A. No, no, no. And that was never said to anybody, first, I mean, directly, never. I never threatened anybody at any time, school directors, in spite of our differences of opinion, never happened that way.

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[84]

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Q. Okay. Now, turning to Page 8 of the transcript. which is Exhibit 2, right after the part I just read about the, you know, blowing off the porches et cetera, and you end up indicating that you're obviously upset about the fact that they're talking about—the School Board is talking about their negotiating position in the newspaper, correct?

A. Yes.

Q. And then you said, 'You don't discuss this in public, particularly with the press.' Gloria Bartnicki said. 'Exactly. . . Well, but now, uh, all rules are off and they'll discuss anything they want.' And you said. 'Yeah, well if the rules are off, the rules are off for us, too.' And Bartnicki said, 'Exactly.' You said, 'The rules are off for us. too. So, if you want to get beat over the head, too, get beat over the head.' What did you mean, the rules were off?

A. Well, negotiating rules. I mean, they ran to the press constantly; they were doing things that were unorthodox in negotiations. They weren't following any rules at all, so we could do the same things as far as perhaps going to the press. Although [85] they had the advantage.

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[86]

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Q. And what did you mean when you said, 'The rules are off for us, too. So if you want to get beat over the head too, get beat over the head'? What do you mean by 'beat over the head'?

A. Another figure of speech. Negotiating at the time and, you know, I don't know what else to say. We would play rough in the negotiating game, too. We were very calm up to that point, trying to get them to understand reason. We

weren't you know having any strikes or we were—slowdowns or anything else. We were just trying to get them on the right side to understand what our position was. It was very difficult to get them to understand it because they didn't want to understand it. That's all that meant.

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[93]

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Q. What was the status of the negotiations at the time that this conversation took place?

A. Up in the air really, in pieces. Very little settled.

Q. There was nothing very—

[94] A. Very little settled.

Q. Was it a fairly—at that time, was it—would it be fair to characterize it as a very contentious negotiation that was still going on between the district and the union?

MR. WENDOLOWSKI: Object to the form. You can answer.

A. Yes, yes.

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[96]

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Q. And you feel that the tact that he played [97] the tape of the conversation held you up to ridicule?

A. I think so.

Q. In what way? I mean, just the mere fact that he publicized it?

A. Well, probably thought I was some type of gangster, what else?

Q. What evidence do you have that your reputation was harmed in the community or in your profession?

A. That's what I'm feeling.

Q. I know that's what you're feeling.

A. That was my feeling when I heard it, that I was being ridiculed.

Q. Are you aware of any objective evidence of that of any kind?

A. I don't know how people that I don't know would react to me on that. My friends, it didn't matter anything.

Q. I'm going to say, are there any people who were friends of yours that are no longer a friend of yours because of that incident?

A. No, no. But I don't know how it appeals to other people that I don't know, strangers.

Q. Well, then you don't really have any evidence of what—you can't name for me the name of [98] any person whose opinion of you was diminished by that, sitting here today; is that correct?

A. I would say so

Q. That is correct?

A. A personal, yeah, of a person that knows me.

Q. Right.

A. But I can't speak for people that don't know me. They saw that, they'd think I'm a gangster of some kind.

Q. Well, do you know—can you give me the names of any person who really doesn't know you personally but who has that view of you?

A. Well, I don't go to seek then out; I wouldn't go looking for them. I don't have the time to do that.

Q. So you can't give me the names of anybody?

A. No.

Q. You haven't been affected in your job in any way by this, isn't that true? You're still doing what you always did?

A. Right. The Board is doing other things to me, but not because of it.

Q. Not because of the tape?

A. It's hard to tell what they're doing because they're trying to change my schedule and cut down on [99] teachers and giving me extra work.

Q. Do you think that was because you're the union leader?

A. That's probably part of it, and they didn't necessarily, you know, get what they wanted in negotiations.

Q. Can you identify for me in any way you were economically harmed by the playing of the tape by Mr. Williams on his show?

A. No, I don't think so. I still have my Job.

MR. WENDOLOWSKI: By 'economically', you mean out-of-pocket losses of dollars?

MR. BROBST: Right.

A. Yeah. I'm still working and, like I say, people that know me, even acquaintances in the community that—I'm associated with the United Way and I've been acting that—it hasn't affected my contacts with people like that.

Q. This hasn't affected your community activities in any way?

A. No.

Q. And as far as you can see, it hasn't affected your standing in the community?

A. I don't know how other people—how the general public look at me.

[100] Q. Well, my question is though, as manifested to you. You're not aware of any—you can't point to me to any incident where you felt—

A. That anybody said anything to me?

Q. Right.

A. No, but I'm sure they have their own opinion. I'm sure they have their opinion.

Q. You didn't suffer any physical injury as a result of this, did you?

A. No.

Q. You didn't consult with any physicians or psychologists or psychiatrists because of the playing of the tape?

A. No.

Q. You didn't suffer any emotional distress as a result of the playing of the tape?

A. Not that I can—I don't think so. I was mad. I was angry, but I don't think that was emotional upset.

Q. What did you do, if anything, to counter the publicity, what you viewed as the publicity campaign against you as a result of the publication of this tape? Did you take any steps to have your own media campaign to counter it in any way or information campaign to the media?

[101] A. I think I just said it was referred to counsel or PSEA counsel, or some such thing. As I said, I didn't discuss the episode very much in the press.

Q. Well. did you tell the press that it was only a figure of speech and that you didn't really mean what it literally said?

A. Yeah, they wrote about it and said it that way.

Q. But did you tell reporters that that—

A. Oh. Well, I said, it was just a harmless thing. The experienced reporters knew what was going on, you know. In fact there was columns written about it. Mike McGlynn wrote an article about it and other people.

Q. And the nature of that article was favorable to you?

A. I would think so. There was even a cartoon in it. How many times does the football team says, I'll kill you and, you know, stuff like that. That type of thing. So there was a little bit of balance on the thing, but not an awful lot.

Q. And the balance was that it was played at least by some of the people, some of the reporters played it as a comment that was just one in jest and [102] not a serious comment?

A. Yeah. it yes part of the negotiation process. Labor management type of thing that goes on all the time.

Mr. BROBST: I'll have this marked as the next exhibit.

(Deposition Exhibit No. 4 marked.)

Q. I show you what's been marked as Exhibit 4, and is that the article by Mike McGlynn that you just made reference to commenting on the tape?

A. Right, yeah, October 3rd, yeah.

Q. And that was published shortly after the tape was played for the first time on The Fred Williams Show, is that correct?

A. Yes.

Q. And you viewed this as a favorable article, correct?

A. Yeah. I would say so—trying to bring some semblance of what was said. Favorable in that respect. I didn't think he said I was a great guy but, I mean, what he did say is detailed.

Q. He said it was metaphorical, what you said. I think is what he said, is that correct?

A. Yeah.

Q. The article will speak for itself. Now [103] you're saying there was other articles written that were less favorable to you?

A. Well, the way it was said—yeah, I don't think they were columns necessarily, but I think in the news they implied certain things. They didn't try to explain you know, too much.

Q. They just quoted what was on the tape without making an explanation of it?

A. Yeah, right.

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[105]

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Q. It says 'actual damages.' That's what I'm saying. You've already testified you weren't economically hurt.

A. No, I just feel that every time he blasphemed me—and that's what he did—it was damaging to my reputation, And maybe it affected me in ways I don't know. I don't know. Maybe I lost some income in other lines of work that I do, other [106] than teaching. I didn't lose my job teaching, but I'm an active musician in the community; I have been since I've been 15 years old.

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Q. So you're not sitting here today saying that because Mr. Williams played those tapes, that somehow you've lost money being a musician? Because you don't know that.

A. I don't know. These are the unknown things I don't know.

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[113]

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Q. Apart from the musicianship then, you're not making any claim—you can't tell me any claim here today that you're making for any actual damages that you've incurred as a result of the playing of the tape, is that correct?

A. That's right.

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[124]

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Q. Well, Mr. Vopper had a point of view on this whole subject, didn't he, that he thought the teachers were asking for too much of a raise, correct?

A. It went beyond that, it went beyond that. He was vindictive in everything he did, and I really think he was trying to do physical harm because he got Burns and Warman to mention the type of cars that I could drive, the color and so forth.

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Deposition Testimony of Plaintiff Gloria Bartnicki, December 30, 1994

[9] By Mr. Brobst [Attorney for Defendant Frederick W. Vopper, et al.]:

* * * *

Q. What would be your role with the—in the collective bargaining process that took place here between the Wyoming Valley West School District and the teachers' union?

A. I was titled the chief negotiator because I was the chief spokesperson at the table. So that meant that at its onset, I would meet with the negotiating team; find out what they wanted to propose. Our office prepared those proposals and then orally, at the bargaining table, I would present or package and our counterproposals—things like that.

Q. And how did your role jive with that of Mr. Kane's? In other words, how did he fit into what took place in the process?

A. Okay. Tony was the local president, so he really had charge of the local. I was there as an advisor and again as the chief spokesperson at the bargaining table.

Q. So Mr. Kane, with this committee that he said he appointed, they would determine what their position was—

[10] A. Yes.

Q. —and they would tell you and then you'd be the one who would verbalize that during the negotiations?

A. Exactly.

Q. But what position they should or shouldn't take, while you may provide advice on, that was for Mr. Kane and his committee to decide?

A. Absolutely.

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Q. Until Mr. Williams played it, you didn't know it'd been disseminated to the media?

A. No, I did not.

Q. And indeed, you don't know whether it was disseminated to the media—other than Mr. Williams, whether the other media got it much prior to the time that he played it?

A. Some people have told me things, from the media, about when they got the tape.

[14] Q. And what have they told you about when they got the tape? And be specific as to which media you're talking about.

A. Okay. Anne Karolyi from The Times Leader told me that they had the tape from the spring of '93 and that the only reason—they were not going to use it and that the only reason that they did is because Fred Williams revealed it and The Times Leader management felt that they didn't want to not publicize it. I'm trying to think of who else. Somebody—I've had conversations about it with Kevin Jordan from WYOU and with Kathy Bozinski from WBRE. One of them, and I'm not sure which one, mentioned that they had had it for a while before.

Q. Before Mr. Williams played it?

A. Right. I forget what your original question was. What my relationship was with the media?

Q. We'll go back to that. What your relationship with the press was prior to, you know, how you interacted with them?

A. I believe it was a very surface kind of relationship. Once in a while someone would call, I don't even remember

names because they constantly changed, and asked how are the negotiations going? Is there going to be a strike?—very usual questions. [15] Anne Karoly; from The Times Leader was really the individual that I spoke with most because she was assigned by The Times Leader to sit at all of our meetings.

Q. For the negotiating sessions?

A. No, no, just—

Q. The School Board meetings?

A. No, through—at the negotiation sessions she would sit in a—the lobby, I guess, of the school. And she would have to sit around for hours and hours and sometimes when we were caucusing we would chat about things. So she was the one that I had—I don't want to say a close relationship but she's the one that I talked with the most.

Q. So she relied on you to get information about what was going on in terms of the negotiations?

A. I don't know if she relied on me, but. . .

Q. Well, she's one of the people?

A. Yes.

Q. She could have had other sources?

A. Yes.

Q. Okay. How about anybody form the Citizens' Voice that talked to you for information?

A. Before the release of the tape?

Q. Right, correct.

[16] A. I can't remember.

Q. And how about any of the TV stations?

A. I'm trying to get a time frame here. The strike was in June of '93 and then the tape was released in September.

During the strike—I'm trying to think of the guy's name from Channel 16—Jim Renick was at a picket line one day and we exchanged a couple of words about the strike.

Q. Did he interview you on camera?

A. No.

Q. Would you talk to them on camera?

A. No.

Q. But you were willing to answer questions off camera to give then information?

A. Yes. Kevin Jordan, I've known him for years, and he would just be around, you know.

Q. Ask you for information?

A. Uh-huh.

Q. Kevin works for Channel 22, correct?

A. Yes.

Q. Anybody from radio ever contact you during this Period of time?

A. Yes. The guy that's not on WARM anymore. Kevin Lynn. He had contacted me one day because he felt that there was a great misunderstanding about [17] teacher tenure and about the actual negotiations process, about the arbitration process that takes place during negotiations. And he did an on-air interview with me and I was on my car phone, as a matter of fact, when that took place.

Q. Oh, he interviewed you on your car phone?

A. Yes.

Q. And he broadcast it simultaneously or reported it—

A. Yes, simultaneously.

Q. And then he probably recorded it too and played it again during the news?

A. It was a talk show kind of thing and I remember him saying we have Gloria Bartnicki on the line. He had called our office and said it was very important that he talk with me, so I called him back from the car phone.

Q. And what was the nature of that interview? I mean, just what was subject matter of it?

A. A little bit about negotiations. He wanted some clarification about what teacher tenure meant, was it really possible to fire a teacher or was the public opinion that a teacher could never be fired, true. Very benign kind of interview. And I can't remember when that took place, but it was during this [18] process.

Q. But that was before September of 1993?

A. Yes.

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Q. When you say you didn't talk to them about the tape with them, is that because you just refused to comment?

A. Yes, I did.

Q. And why did you do that? Was that on the [19] advice of counsel or did you just decide yourself you didn't want to comment on it?

A. I had decided, personally, that it was too disturbing to get into a fray with then and PSEA had advised me not to comment on it.

Q. "Was too disturbing to get into a fray with" who?

A. With the media about—do you really think Tony was going to blow off porches? Just did not want to talk about it.

Q. Well, did you really think that Mr. Kane was going to blow off porches?

A. Absolutely not. And for the record, I've known Tony for 24 years. I've heard him talk tough for 24 years and never once thought that he would hurt a fly.

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I do know that at that particular time Tony didn't tell you this; Tony wouldn't tell you this—he was very upset about the possibility of a strike in Wyoming Valley West, and for a while before the strike took place, the team and I were trying to convince him that the strike had to take place. And he really hesitated at the time of the conversation—and we believe that it took place sometime in late May, the strike was going to take place sometime the first or second week of June. When he talked like [21] that, in my mind, I knew that he had come to the conclusion that we were going to have to go ahead with the strike, and that's the only thing that I thought about when he said it:

Q. That he was very upset about that?

A. Well, that he really had come to the realization that this strike was going to have to take place. In the law, in order to get to the arbitration process, there are only two ways you could do it, and that is by both parties agreeing to voluntarily go to arbitration or there had to be a strike which put the 180 days in jeopardy and then you'd be forced into arbitration. We had asked the Board on a couple of occasions to go into voluntary arbitration and they refused. So we knew that to get to the next step we would have to strike. And it was just about that time that we were all realizing it was really going to have to take place.

Q. And this had an upsetting effect, you're saying, on Mr. Kane is that what you're saying?

A. Yes, it did.

Q. So you took his comment to be a hyperbole by a—by someone who was somewhat upset by the prospect of having the—ruin his record of no school strikes?

A. Yes.

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A. 1993, because this tape was released one or two days after the arbitrator's decision on the [34] dispute was released to the Public and we basically won that arbitration.

Q. But it was non-binding?

A. It was non-binding. And it was immediately after that that the tape was released.

Q. So the big news event going on at the time that Mr. Williams first played the tape in September of 1993, the end September, was the arbitrator's decision that was—the non-binding arbitrator's decision that was favorable to the school teachers?

A. Yes.

Q. And how much of a raise did that arbitrator recommend?

A. I'd have to check the documents, but I believe six percent.

Q. And that was closer to what the teachers had wanted than what the School Board was offering?

A. In the arbitration process, the arbitrator may choose one side or the other. He may not come down in the middle or closer to one or the other.

Q. So he chose the teachers' position?

A. He chose at the teachers' position.

Q. And what was the School Board's position on that?

A. I can't remember exactly. It might have [35] been around three percent, but I'd have to check.

Q. And the people who were opposed to the teachers were very unhappy with the arbitrator's decision?

A. Very. It was the School Board; I'm referring to the School Board.

Q. So it was in the context of that decision and the controversy that that generated that Mr. Williams first aired this tape, is that correct?

A. Yes. It was publicized too that part of the arbitrator's decision stated that he felt that the School Board had not acted realistically in lowering taxes that year. I believe that they lowered the taxes by a half mil. And he took a couple jabs at their management policies, which I believe could have been embarrassing to then. And as I look back on it now, that could be what sparked the tape, to sort of divert the attention free what the arbitrator's decision was to the goon and the goonette.

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Q. In the document, what you're looking now is Exhibit No. 2?

A. Yes, yes. It says that the tape was, I don't know, something, warped or whatever, to protect the phone numbers. At one point, he did play this part of the tape that released my phone numbers because I had to change my phone numbers. I began to get terrible calls after that. So I don't know how that was done.

Q. Calls from who?

A. I have no idea.

Q. What were the nature of the calls?

A. They were hang-ups; they were sarcastic comments about teachers. And I instantly called the phone company And it all happened on the same date. He supposedly played part of the tape and I got a couple of calls from people saying your phone numbers were just on the radio, and the calls started within hours and I had my number changed. I also had to have my car phone number changed.

Q. Why'd you have to have your car phone number changed?

A. Because he released that also.

Q. What, he said call these people and tell them what you think of their proposal or what they're [38] doing?

A. No, he played—and I didn't hear it—but from what I understand. he played that part of the tape where I was giving Tony my car phone number and my home number.

Q. Oh, okay. That was part of the tape?

A. Yes.

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How long have you owned you car phone—or your cellular phone?

A. Five years maybe, four or five years.

Q. And do you have the same feeling of security in terms of your conversations being not overheard by anyone out there when you use that phone as when you use your regular phone?

Mr. WENDOLOWSKI: Do you mean now or before this incident?

Mr. BROBST: Before this incident.

A. Before the incident. I believed that that phone was as secure as a house phone. We had purchased the phones as a group in our office and our region. Three or four of us bought the phones on the same day. And the representative from CellularOne, his name was Paul Smedly, he no longer works for them, told us that the phones were just as safe as any phone that we used. And the literature that CellularOne gave with the phone, indicated that it would be extremely difficult for anybody to intercept [45] a call and that even if they did, it was illegal for them to either tape it or publicize the contents of it. I never thought about it again. I talked on that phone as if I were on my house phone.

Q. Did the literature though, indicate that it was possible to intercept it even though it would be illegal to do so?

A. The literature said that is was, I don't know the exact words, but I—extremely difficulty. And I have a copy of that; I could show it to you.

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Q. So has this altered the manner in which you use your cellular phone?

A. It has altered the manner in which I live, Mr. Brobst.

Q. But I'm asking specifically in terms of the way you use your cellular phone. Has it altered the way in which you use that phone?

A. Yes.

Q. In what way?

A. I always think that there's somebody listening. I try to be extremely careful with what is said on the phone. It's cut down on my efficiency in the job sufficiently because I use the phone quite a bit in my job and I hesitate to do that now.

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Deposition Testimony of Defendant John Yocum, Taken by Plaintiffs, January 27, 1995)

[11] By Mr. Wendolowski [Attorney for Plaintiffs]:

* * * *

Q. Are you affiliated with the Wyoming Valley [12] West Taxpayers Association?

A. Yes.

Q. And when did you first become affiliated with that group?

A. I don't know the exact date. Three years ago possibly in that area, it started. It was around the time that the Dallas taxpayer forum was fighting, in that area.

Q. And what's your affiliation with that group?

A. I run it as president, or whatever name you want to—

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Q. Did you have any conversations with any [17] members of your network regarding the support of candidates running for election since you became associated with that network?

A. I was probably—I would think that there were conversations when people would ask me, who do you support in something like that? I would think that that probably occurred. I don't remember specific conversations saying, oh, I think we need to do this. But I do believe that there were times when someone would certainly ask me, what do you think of this candidate. And I would give them an opinion if they asked me.

At a certain point in time, it became known to all of us, and which I've had a primary part in, of understanding that to win

what we're doing, to win the war is more important than to win the battle. So even at that time, during those election times, our focus is on a much higher plane than locally.

Q. First of all let me ask you, what's the war you're talking about?

A. The war to taxpayers would be against a union that we view as being out of control.

Q. In what way?

A. With their aspirations for money and benefits.

[18] Q. Any other way they're out of control?

A. Out of control in behavior.

Q. What type of behavior?

A. The many threats that I received at home, in my business. My family received threats. Having school board members tell me that, by Ross Galteri, who is one of the higher union people in the Wyoming Valley West Education Association, who said to—the one person I'm sure of that sat in on this conversation was Neil McAndrew. It could very well be in my memory. I am not sure of this. Could be Kevin Warman. This is not a direct quote, but the implication was clear, that you people had better start looking under the hoods of your cars before you start them in the morning. That to me is not behavior that I would want my children, if I had children, I would not want my children being taught by people like this.

Q. Any other behavior?

A. Behavior like taking the petitions that were given to—the 25 hundred signed petitions, pouring over those petitions and calling and harassing those people in their homes because they knew who they were, is not what I deem moral, good, behavior by people that care about children.

[19] Q. Any other behavior?

A. I think—to me, just because I oppose them on a level of money and benefits—to be totally ignored. Excommunicated from their world. Boycotted, as I hear. Can't prove, but hear my company is. I think is not behavior that I would do to anyone.

Q. Anything else? Any other behaviors?

A. Hearing the tape, clearly to me, I felt morally in a position where I had to make a decision. And I clearly—and my belief is that I had to make a decision morally whether I should do something with that tape or not. And I don't think that that is behavior that I view as responsible.

Q. When you say behavior you view as responsible, you mean the conversation that took place in the tape?

A. Correct.

Q. Any other behavior?

A. The rest is hearsay things.

Q. Such as?

A. Hearsay things of things that are said to me from people that work within the district that might see or hear things that go on.

Q. What have you heard, and from whom?

A. Again, this is real general. And I don't [20] remember, because this is so many years ago. Just things that go on about how—comments that would be made by people that are in the union. I mean, real union people, not just regular teachers, about taxpayers. Ross Galteri making comments, I know, at the Forty Fort Fire House in glee, that he joined the Wyoming Valley West Taxpayer Forum. As if we wouldn't know who he was.

It's almost like it's a contest. That's why the term war comes out. It's not a war to us. We just want responsible leadership from our people that we pay to teach our children. And that's how we view it. And they view it as, this is a war. I mean, to them. We are excommunicated, many of us. And I again say, in that respect, that I don't agree.

Q. Any other statements that you can remember, and from whom?

A. People that would sit in school board meetings that would hear the comments made behind them or around them. And again, I don't remember all the—I can't tell you specifics. It's general information of things that went on during certain school board meetings by taxpayer people that were sitting in the audience.

Q. What was being said, and by whom?

[21] A. Remarks that would be made. And again, I only know—it's too long ago. I can't remember all the things that—

Q. What were the nature of the remarks that were being made?

A. Anti-taxpayer. Like we are anti-education. Propaganda.

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Q. Let me get back to the specifics of the behavior that you thought was inappropriate. You said you received threats at home. When you did you receive these threats?

A. I would get hang-up phone calls at home. I received one phone call at home that was, it was similar to phone calls I had at work. Which were in essence telling me, if I didn't stop what I was doing, that they would have my company—

they were going to have—something like OSHA or some similar organization come in and go through my building. In other words, the intent was to make me spend money, and aggravate me.

Q. Any other threatening phone calls that you received at home or at work?

A. Threatening phone calls at work—one of my employees was there to hear. And I don't remember which one it is, but I did mark all this down. And I can access it, if you do need it. But, telling me that if I don't back off, that I could be hurt.

Q. Did you report these threats to the police or any other government agency?

A. I don't know if—I may have called the [24] police to tell them. I do remember definitely letting WILK know, and WARM.

Q. And who made the threats?

A. I don't have a clue.

Q. And, Mr. Yocum, why would you report the threat for sure to WILK and WARM, and not so sure to the police?

A. Because I don't think—I think knowing what the police would do, would be to say to me, well, Mr. Yocum, there's not much we can do. If they persist, eventually—I'm just—I know what they would—that would be—I would expect that that's what would happen. And if I did call them, which I very well may have, just to have it on record that I made the phone call.

My view is being public is protection. And at least it's out there. By calling the police, I really have no protection. If I'm beat up, that's when they can do something. Or if something were to happen to me, that's too late.

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And I want to ask you some questions about that. First of all, where did the tape come from?

A. I have no idea.

Q. And where did you get it?

A. It was in my mailbox.

Q. When was it in your mailbox?

A. I don't even remember the exact time. The only thing I remember, it was cold. It was still cool.

Q. It was cool.

A. And I came home and found it.

Q. You'll recall that this tape was eventually played on the Fred Williams Show?

A. Yes.

Q. In that time frame, from when it was first played on the Fred Williams Show, can you give an idea of when you got the tape? And I think I can represent to you that it was played on the Fred Williams Show either the last day of September or the first day of October of 1993.

A. The only thing I can remember is that it was—because it's again, a while ago. It was cool and I thought spring. I thought it was in the spring.

[31] MR. BROBST: Just for the record. My recollection of Mr. Williams' testimony was that he didn't play it right away after it was delivered.

(Continued by Mr. Wendolowski):

Q. Any idea who made the tape?

A. I have no idea.

Q. Any idea of how it was made?

A. I have no idea.

Q. Have you ever had any discussions with anyone of how you thought it was made?

A. I think everyone would sit and wonder how something like this could be picked up. And the only thought I ever had is that obviously one of these phone lines in my opinion had to be ungrounded. I remember speaking with the Times Leader People, and they said they pick up phone calls constantly from cellular phones or ungrounded phone lines. They hear them all the time. So I'm just thinking—the only thing I could ever imagine is that somebody just picked it up somehow. I have no idea how they did it.

Q. Who did you discuss that with at the Times Leader?

A. Oh, I don't remember if it was Tom Dennis. I don't remember if it was a reporter. But they said somebody over there—this was so long ago—told me [32] that they pick up phone calls on their, whatever—scanners, or whatever—media constantly.

Q. Did you ever discuss how it was made with Fred Williams?

A. Just probably, just the same things that I've just said to you. Just surmising how something like this could occur. I have really no idea. I'm not an expert in electronics.

Q. Do you have any background in electronics?

A. No. I have trouble hooking up my VCR.

Q. You own an electronic receiver?

A. No.

Q. You own any scanners?

A. No.

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Q. Other than playing the tape for yourself, have you played the tape for other people?

A. School board members asked me, when I played [34] for it them.

Q. How did they know that you had the tape to ask you to play it?

A. I let them know.

Q. And which school board members did you let know you had the tape first? The ones that you let know first?

A. I'm not—again, my memory may not be serving me well. But I think the people I played it for were Jim Burns. I don't know if I played it for any of the others, except that I know that Neil McAndrew came over to my home to hear it.

Q. And you played it for Mr. McAndrew in your home?

A. He listened to it.

Q. Did you play it for Mr. Warman?

A. I don't remember if I did or not

Q. Mr. Youngblood?

A. I'm not sure. I really don't remember.

Q. Did you play the tape for anybody else besides school board members?

A. Nope. Obviously this was a concern, a tape like this. And I was very concerned about it. The only place is WILK.

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Q. Okay. Let me rephrase the question. Other than the school board members that you testified to this morning that you played the tape for, did you [41] play the tape for any other person?

A. No. Not that I remember.

Q. Did you ever play the tape for Mr. Williams?

A. No. They listened to the tape when I presented it to them.

Q. Other that Mr. Williams of WILK, have you given copies of the tape to anyone else?

A. The only other places I gave a copy to is WARM, Rob Neyhard.

Q. Pardon me? Rob Neyhard?

A. Right.

Q. Did you give a copy or the tape to any other media representative?

A. Not that I remember.

Q. Is it possible that you may have given it to other media representatives but that you just don't recall doing it? I want to be sure that your answer is, either you don't remember, or you didn't do it, or you're not sure.

A. I really am not sure I did this. I am involved in two companies, and write in and do many things, and it's very hard to remember some things as good as my memory can be. I am not sure.

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Q. Describe for me how it came about that you gave the tape to Mr. Williams?

A. I listened to the tape. I determined that when you are the individual that hears something like what was on the tape, I had to morally make a decision. If I went to the police. I knew they would say the same things I described earlier about the phone threats. "Well Mr. Yocum, when someone's porch is blown off, or after something happens, we'll do something. We can't do anything before that."

So it was my position to, which I feel strongly about, make it public. And if WILK was willing to hear it, so be it. And that would at least provide protection in the best way that I could. I could not morally live with the fact that what if this did happen, if I did nothing.

Q. And did you call Mr. Williams and tell him you had something to give him?

A. I may have. I'm not sure I called to say that I wanted to see him. That I had something to give to him, yes. I may have done that. I'm not sure.

Q. In any event, there came a point in time [45] when you actually traveled to the radio station studio to meet with him?

A. If I recall, and again this is, I'm not sure of the times. But I believe, that I made that decision that very night after hearing the tape, and did that the next morning.

Q. And recall for me the best you can, the substance of your conversation with Mr. Williams when you gave him the tape?

A. What occurred—I do remember when I went there, because I was concerned and nervous. Mark Michaels was there. And we went into the studio and played the tape. I do remember that.

Q. What did you tell Mr. Williams or Mr. Michaels about what was on the tape?

A. I didn't tell them anything. As I recall, they just played the tape, and soon after that I left.

Q. I'm assuming at least you said, I have a tape I want you to listen to?

A. Right. I said really, that I found this. Told them what happened. Told them I listened to it, is what I'm assuming I said to them. I mean, it wasn't—and they listened to the tape. And what happened after that I really don't remember. I just remember that they listened to the tape.

[46] MR. BROBST: Just for the record who's "they"?

A. Fred Williams and Mark Michaels.

Q. Did you tell them who you thought was on the tape?

A. No. I think—I may have. I think knowing my association at that time, Wyoming Valley West was in turmoil with all the things that were going on. So it was a natural reaction for then to think that this had to do with Wyoming Valley West. And I'm assuming, and again, whether they—it's obvious—because he knew. If I remember. George Dervinis' name is mentioned on the tape. And so it's an obvious call, so they probably brought it up. I mean, I don't remember what transpired after that. I do remember I was not there very long, and I was out the door. Because I had to go to work.

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Q. You said that when you showed up at WILK that day. you were concerned and nervous. Why?

A. Because there were threats.

Q. Threats by whom?

A. The people I was assumming were Tony Kane and Gloria Bartnicki on the tape.

Q. And you felt threatened by the tape?

A. I felt concerned for school board members.

Q. You weren't personally threatened by the tape?

A. If you listen to the tape, I'm not the person mentioned at all in the tape. So that it was not a threat directed directly at me. I was aware of fact that if I gave this tape to Fred Williams, that I might become a target of, I suppose threats. But my concern was for school board members and their children.

Q. So just so I'm clear, you didn't feel threatened by what was on the tape, but you did feel threatened by the fact that you were about to disclose the tape to Mr. Williams?

A. I think it's nerve-racking to any individual when you're dealing with something like this. They [49] have threats on it. They're dangerous. I think it would be a normal human reaction to me.

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Deposition Testimony of Peter Paul Olszewski, Jr., March 10, 1995

[12] By Mr. Brobst [Attorney for Defendants Frederick W. Vopper, et al]:

* * * *

Q. And in fact, the President of the Pennsylvania State Education Association, Annette Palutis, wrote you a letter, also requesting that you investigate all the circumstances surrounding the [13] taping and dissemination of the alleged private telephone conversation; is that correct?

A. Yes, sir, I believe that is correct.

Q. Now, as a result—strike that. What was the outcome of the investigation? Was there any action taken against anyone?

A. Based upon the investigation, no criminal charges were filed. Number one, we were unable to determine the person or persons responsible for the actual taping. Number two, relative to the alleged threats that were made, we did not believe, for a variety of reasons, that that information resulted —that that conduct equaled a criminal offense, and therefore no charges were filed.

Q. How about with respect to the playing of the tape on the air by Mr. Williams, and for that matter, it was played on the air by Channel 16, and the transcript, I believe, was in part printed in some of the newspapers?

A. There was no active investigation relative to that aspect of this event.

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Q. And was there some reason why you did not?

A. It was my judgment that the conduct, while it may have been criminal, was not an area that I wanted to devote

significant resources toward investigation of. We have to prioritize the matters which we investigate and prosecute. We have a very limited, finite amount of resources. And it was my judgment that those resources were better spent elsewhere.

Q. Would it be fair to say that there was no, then, determination made as to whether or not there was any criminal violation by the conduct of any of the persons in the media who disseminated the tape?

A. There was no investigation to determine what—any facts, and therefore, there was no judgment made as to whether in fact it did constitute criminal activity.

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Q. Have you ever had any other conversations with Mr. Getz concerning The Fred Williams Show?

A. Yes, sir.

Q. And under what circumstances did that occur?

A. The circumstances were compliants that I [16] made about the untruthful, inaccurate, scurrilous, and certainly potentially libelous comments that Mr. Vopper has a tendency to make on a regular and frequent basis.

Q. Would it be fair to say you don't share Vopper's views on many public issues?

A. I don't know what public issues Mr. Vopper talks about, other than when it affects me and/or my office.

Q. Okay. So the criticisms that you relate that you had of Mr. Vopper had to do with his comments concerning either you or your office; is that correct?

A. Yes, sir.

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Q. So that meeting took place in your office, at the District Attorney's Office, County Courthouse, correct?

A. Yes, sir.

Q. And that was—can you put a date on that meeting?

A. No, sir.

Q. But it was before—

A. It was before the phone call he made to me about this matter.

Q. Right, okay. Did you, during the course of that meeting or any other time, ever tell Mr. Getz that unless Mr. Vopper changes his ways, that the District Attorney's Office would, in the future, cut his radio stations off, his news reporters off from information from the District Attorney's Office?

A. I may well have. We don't have a practice of disseminating information to gossips, town gossips.

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Q. Did you ever talk directly with Fred Williams about your complaints about his statements about you or your office?

A. Not to my recollection.

Q. Have you had any conversations, to your recollection, with Mr. Getz since the phone call concerning the tape?

A. I don't believe so, no, sir.

Q. Has your office in any way cut Mr. Getz'—the radio stations that he manages out of the information loop of the DA's Office?

A. It's my practice not to send news releases to WILK Radio.

Q. How about WGBI?

A. I'm not familiar with WGBI.

Q. Do you send press releases to other radio stations?

A. I send press releases to responsible media outlets.

Q. Well, my question, specifically, is other radio stations.

[21] A. Yes.

Q. How about television stations?

A. Yes.

Q. Is there anybody else other than WILK that doesn't get them?

A. From what group?

Q. Of the media. Is there any other media outlets that you've put in the same category as WILK that don't get your press releases?

A. Oh, nobody else is in the same category as WILK.

Q. Does that mean that they're the only ones that don't get your press releases?

A. There may be radio stations out there that aren't on our list of—just by chance or coincidence—that they're not on there, or they don't have active, you know, news—where news isn't an active part of their product, so that could be.

Q. Okay. There's nobody else on—

A. There's nobody else that I exclude.

Q. That you exclude because of your disagreement with what the radio station is putting on the air?

A. It's not my disagreement for what they put over the air; it's my analysis of their ability to act [22] as a responsible journalist—or their inability to act as responsible media representatives.

Q. Okay. WILK is the only station that you've decided is not a responsible—

A. Yes, sir.

Q. —media outlet in terms of radio and television stations; is that correct?

A. Yes, sir.

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A. Should a reporter from WILK be present at a press conference or amongst other reporters, I provide information to everyone present. So I don't—if a reporter from WILK is there, they're privy to and have access to what's happening at the time.

Q. You don't exclude them from the press conference is what you're saying?

A. Right.

Deposition Testimony of Nancy Kman, March 10, 1995

[7] By Mr. Wendolowski [Attorney for Plaintiffs]:

* * * *

Q. What was your position originally, when you were hired by WILK?

A. I was the afternoon news anchor.

Q. And has that position changed since then?

A. Yes. it has. I'd say in April of 1993. I assumed the position of program director. I was not named it. I was the interim program director as they searched—as well as news director. I was the news director. In November of 1993, I was named the program director officially, but I assumed the duties from April of '93 through November of '93. And now, since then, I've still been news program director.

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Q. What was your understanding of the circumstances that were going on?

A. Well, I knew the story; it was a big story going on. It was controversy. It was, you know, a newsworthy story at the time, that this school district was trying to—the schoolteachers were trying to get a raise, and the school board was not giving in. So it was a big story at the time. So I knew of the story in the background. I just didn't know the people involved.

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Deposition [Second] Testimony of Plaintiff Gloria Bartnicki, June 13, 1995

[11] By Mr. Gerow [Attorney for Plaintiff Jack Yocum]:

* * * *

Q: What did you talk about when you talked about getting a car phone?

A: That somebody was coming to the office about the possibility of installing some car phones and [12] those of us who were interested spoke with him.

Q: Did you talk about what kinds of phones you wanted, what they would do?

A: Not the kind, and as far as what they would do, he just gave us instructions as to how to make the call and end the call.

Q: That's all you were concerned with? You didn't ask any other questions about the capacity or the capability or technologies of the equipment?

A: We talked about the area where we would be able to make local calls where they would not be toll calls and we were told at that time that the entire state of Pennsylvania may become a local calling area within a few months if the technology permitted. It, obviously, didn't. And we were told that the phones were private.

Q: Who told you that?

A: Paul Smedley.

Q: Why did he tell you that—did you ask him?

A: I did not ask and I don't remember if anybody else did.

Q: Did he tell you that personally?

A: He told us that as a group.

Q: Were you present when he told you that?

A: Yes.

Q: Did this come up as part of his sales pitch?

[13] A: I don't remember.

Q: You don't remember anybody asking him that question?

A: I don't remember anybody asking the question but I do remember him talking about it.

Q: What, specifically, did he say—do you recall?

A: I can't quote him, because it was five (5) or six (6) years ago now, but I do remember him saying that it was safe to use the phone, that it was private, that it was like using a land line phone, and then afterwards, we had received books from Cellular One and those books also included the fact that while it might be extremely difficult to intercept a call, that it was illegal.

Q: When it said extremely difficult, did you take that to mean that it was possible or impossible?

A: At that particular time, I took it to mean extremely difficult.

Q: Did you believe that it was possible?

A: I don't remember what I believed. I don't know if I gave it that much thought at that particular time.

Q: Was it a concern of yours?

A: No.

Q: It was not a concern as to whether it was [14] private or not?

A: No, it was not.

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Q: You said it was a typical comment. Is it typical that Mr. Kane would say—we have to blow off people's porches?

[23] A: It would be typical of him to say something, and I am saying this in quotes—"roughhouse like that"—maybe not that particular comment, but is it Tony's mannerism to talk like that at some times, yes.

Q: Have you ever heard him say we will blow off somebody's porch at any other time?

A: No.

Q: What have you heard him say that would be similar to that?

A: As you've been asking me these questions, I have been trying to think of that. I am having a hard time coming up with quotes. Perhaps, the best way that I can describe it for you is that we are all used to Tony in some situations talking tough, and we all know what it means. During the negotiations—this may be an example for you—during the negotiations, some of the guys on the negotiating team and a couple of the Board Members who have been friends for years would joke with each other and say things like you had better watch yourselves when you leave this building if we don't get a settlement tonight, and everybody would be standing around in a big gang waiting for a meeting to start and there would be that kind of joking.

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Deposition [Second] Testimony of Plaintiff Anthony F. Kane, Jr., June 20, 1995

[4] By Attorney Wendolowski [for Plaintiffs]:

We have had a lengthy discussion amongst all counsel in order to clarify Plaintiffs' position and also hopefully alleviate the need for additional discovery of Miss Bartnicki and limit the additional discovery of Mr. Kane. We have reached an agreement as follows: And the agreement is that the Plaintiffs are withdrawing their claims for actual damages as set forth in Paragraphs 22 and 29 of the Amended Complaint, and are agreeing not to seek those actual damages. This agreement does not in any way affect the claims for any damages assumed in Paragraphs 23, 24 and 25, or Paragraphs 30, 31 and 32 of the Complaint. Is that agreed?

BY ATTORNEY GEROW: It's agreed. Mr. Wendolowski, would it be in keeping with our agreement if I reserve my right with respect to Ms. Bartnicki on issues other than damages?

BY ATTORNEY WENDOLOWSKI: I have no problem with that.

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[15] By Mr. Gerow:

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Q: How would you characterize the negotiations in 1993, up until the end of May?

A: Well, they were—a lot of publicity, a lot of excess publicity that contributed to a lot of bad feelings.

Q: Bad feelings on whose part?

A: Well, on the part, I think, of the association, the Union.

Q: Did you have bad feelings?

A: Yes, I had problems with the negotiation process.

Q: Was it something with the process that you had bad feelings?

A: The process and the people that were supposed to be a part of that process.

Q: Which people did you have bad feelings toward?

A: The people on the School Board that were running to the press every time we said something, and it was all repeated. You can't negotiate in that type of atmosphere, nobody can.

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And then when we got into negotiations, the first meeting we had, that night, everything that we had proposed was on the news—it was on the television station, that didn't happen by accident. It was the first time it ever happened to me.

Q: So you didn't like these guys?

A: I didn't like the way they were handling things. They had a responsibility the same as I did, and the responsibility was to get a contract.

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Q: Just so that there is no question about what we are talking about here. You were aware that a recording may have been made of a conversation that you and Miss Bartnicki had?

A: Yes.

Q: And when did you first become aware of that?

A: I think the day that it was on the radio, a number of people called me.

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Q: And who else's attention did you bring it to?

A: The officials, the PSEA.

Q: Which officials?

A: I believe we got the message to Annette. I don't think I called her myself, but Annette got the message—our staff got the message to her.

Q: Who is Annette?

A: Annette Palutis is the President.

Q: And are you aware of how "we got the message to her?"

A. No, I didn't go into details. All I know is they found out about it.

Q. You are sure that she was very quickly aware of it.

A. Well, I don't know how quickly aware she was. She didn't call me back and say—I just discovered it. I don't know when she found out about it.

Q: When did she call you back?

A: She didn't call me back. She didn't call me back.

Q: How do you know that you got the message to her?

A: I just assumed she got the message because it was all over the papers and PSEA was starting to answer [25] the charge.

Q: How quickly was it all over the papers?

A: Pardon?

Q: How quickly was it all over the papers?

A: Oh, a matter of a day or so, I think, it pretty much spread—maybe two (2) days.

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Q: Mr. Kane, do you have an immediate plan to bring an action against WDAU, Channel 22?

A: I haven't decided yet.

Q: Do you have an immediate plan to bring an action against Channel 16?

A: I haven't decided yet.

Q: Do you have an immediate plan to bring an action against the Citizens' Voice?

A: I haven't decided yet.

Q: Do you have an immediate plan to bring an action against the Times Leader?

A: I haven't decided yet.

Q: You do not deny, do you, Mr. Kane, saying to Ms. Bartnicki in your phone conversation: If they are not going to move for three percent (3%), we are going to have to go to their homes to blow off their front porches, we [38] will have to do some work on some of those guys , do you?

A: No, that was recorded.

Q: Did you say it?

A: Well, it appears that I said it.

Q: Did you say it?

A: Yes.

Q: What did you mean by that?

A: I went through this before—it's a figure of speech that meant no harm to anybody.

Q: Did you use those kinds of figure—did you use that figure of speech often?

A: No.

Q: Did you use figures of speech like that often?

A: No.

Q: Would you characterize this as unusual for you?

A: No, I wouldn't characterize it as being anything. I just said it and that's all.

Q: Did you ever say things like this in the past?

A: Not that I can recall.

Q: You can't recall any instance of saying anything like this?

A: No.

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Q: What did you mean when you said: The rules are off for us, too. So, if you want to get beat over the head too, get beat over the head?

A: Well, these are figures of speech. I don't know what else I could have said. I meant that we would have to fight back in our own way in the negotiating process. And if we use our own style of speaking, that's what I meant. I meant that we would have to do things outside the rules, too.

Q: What do you mean by outside the rules?

A: Well, maybe publicize the things that the School Board was doing.

Q: Is that against the rules of your judgment?

A: Yes.

Q: Which rule does that violate?

A: Well, the rules of mediation where a mediator comes and brings a settlement in and one of the School Directors puts it in the paper, the settlement.

Q: Which School Director did that?

[40] A: Mr. Lowery. I mean they didn't play by the rules from Day One.

Q: When you say it's a figure of speech, where did you come up with the figure of speech—blow off their front porches?

A: It's a statement that was made a few years ago by a state senator in this area—T. Newell Wood, who was asked to do something, to vote on something in the State Legislature, and he said something to the effect that I couldn't do that, or our front porches would be blown off. He was referring to the gang wars in Philadelphia, where some front porches were blown off. And that's where I picked up the phrase. It's really not too unique to me.

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Q: When you first learned that this tape was being played on the radio, did you do anything to try to stop it from being played?

A: How could I stop it? No, I didn't know, the answer is no.

Q: Did you ask your attorneys to call the radio station?

A: Not that I know.

[50]Q: Did you ask any officials at PSEA to call or contact the radio station to at least voice your objection to it being played on the air?

A: Oh, I think they did that.

Q: Did you ask them to do it?

A: No.

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Q: Do you remember Mr. Brobst asking you about your reaction to the taping of this cellular conversation?

A: Yes.

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Q: Do you remember saying in response to the question you thought that a cellular conversation wasn't as secure as using a telephone line—Answer: Well, I never expected it to be broadcast on a radio station.

Question: Well, that's a different issue. Do you remember then saying: No, that's the issue on that. I mean, hey, everything we do is taped. I mean I have no problem with that, stuff is taped all of the time. Do you remember saying that?

A: Yes, I did say that. With the sophisticated equipment that they have today, they can do almost anything electronic. That's what I meant.

Q: What did you mean when you said: I mean I have no problem with that?

A: No problem with what?

Q: Taping conversations?

A: Well, I do have a problem with taping conversations—taping my conversations.

Q: What did you mean when you said I have no problem with that?

A: I don't know quite what I mean, but I have a problem with my conversations.

Q: Were you surprised that somebody ever heard your conversation?

[52] A: Yes. I guess I was surprised. Oh, I didn't expect it. If you don't expect something and it happens, you are surprised.

Q: Do you remember saying to Mr. Brobst in response to this question: So what I am saying is you weren't surprised that somebody had overheard a conversation, but you were surprised that somebody had put it on the radio. Do you remember saying, yes, that's correct?

A: Yes.

Q: What did you mean by that?

A: Well, I don't know. I guess I was speaking too fast. I was surprised that anybody would put it on the radio and I was surprised anybody would tape the conversation. I think I said that earlier in the deposition that I was surprised that anybody would record the conversation. I think I said it earlier, prior to that. I didn't expect my conversation to be aired on a radio station.

Q: But that's really—that's the long and the short of it. It didn't . . .

A: And I didn't expect it to be taped. I didn't expect it to be taped. I don't want anybody listening into my private conversations on anything that I talk about. Even if I call to ask my wife to pick me up in the car, you know, pick me up with the car. I don't like anybody listening or eavesdropping.

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Q: Well, if somebody said that you talked tough, would you agree or disagree with that statement?

A: It all depends on what you call tough. I don't know what you mean. I have to lead people, I got to lead people. I've been leading the union for twenty (20) some years, I am not a daisy when it comes to talking to people.

Q: You never said anything seriously or joking [55] that might reasonably in your judgment be interpreted as threatening physical violence or damage to property?

A: No. People could misinterpret a lot of things that I said.

Q: Even jokingly?

A: No, I can't recall. They may, I don't know. They may take me different ways, different people probably see me in a different light.

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Q: You indicated that you believed that there was an excessive amount of publicity surrounding the negotiations of 1993, what did you mean by that, Mr. Kane?

A: Well, there was a lot of comments about our proposal. As I pointed out earlier, one or two school directors had said that they were going to do certain things when the teachers sat down to negotiate. They telegraphed their message in

advance of negotiations. And then the thing just got out of control with everybody—or with the Board, certain members of the Board discussing things that were happening. That publicity, plus the fact that there was a group of—Mr. Yocum's group was [67] formed, which was adding to the attack on teachers. So there was a lot of letters to the editor, back and forth to Mr. Yocum's group and some teachers, or supporters of teachers. So there was a lot of publicity devoted to our negotiations. Our negotiations were usually the leader in the area, so that anything that was said about Valley West doing away with fringe benefits, attacking the teachers, generally, applied to our school district, because we have a pretty good school district.

Q: Who attacked the teachers?

A: Well, sometimes people would write letters to the editor. School directors at various times would say certain things.

Q: Do you remember anything specific?

A: Well, let's say, teachers—the people that wrote letters that said the teachers should get no raise, there should be no increase. Teachers aren't doing their job. This is coming from people who, I felt, were not in a position to say that, they had no proof of that. If they wanted to talk to the teachers, they simply could have sat down with us and talked to us, and find out what it was they were objecting to. Nobody ever talked to us about any of this. It was all in the press. And the whole thing built up a great deal of animosity. Then there were petitions that were passed around, people signing them, [68] the same people signing two (2) or three (3) times. They claimed they had four thousand (4,000) signatures. Many of the names were repeated. All of this added to the thing, and then we had School directors inviting people to the School Board meetings from out of the area, to come and tell the citizens of the Wyoming Valley West School District how to

run their schools. We had people from Dallas and Wyoming invited by the School Board to come in and make that decision. That usually doesn't happen in normal circles. Usually, the people in the community decide what happens at a School Board meeting, not people from another town. It was rather a unique series of events that took place in Valley West. It never took place any other place that I know of. We have that record.

Q: What was it that made it unique, Mr. Kane?

A: Just what I said.

Q: Which specific thing made it unique?

A: I just started to renumerate. You don't ask people from other towns to come into a . . .

Q: And that is what made it unique?

A: Well, that's very unique.

Q: Letter writing isn't unique, is it?

A: Well, it doesn't happen. I am sorry to tell you, it doesn't happen in most places. Government doesn't run that way—not that way. Not coming to tell a local [69] School District how to run their schools.

Q: Now, other than that, you are unfamiliar with letters being written about teachers during negotiations?

A: Oh, I am used to that, I am used to letters. I am used to that, that added to the volatility, I guess, if you want to call it that, of the problem that we had. And there were letters that answered it, too, of course, you know.

Q: And those were written by whom?

A: Oh, different people—citizens. Some were written by teachers, some teachers responded to them, and some didn't even bother responding.

Q: Did you ever discuss with any members of your Local, the possibility of writing letters to the paper in response?

A: Oh, I might have asked some people, and said, hey, if you don't like what you read in the paper, then write a response to it. Yes, I said that many times to our teachers.

Q: So you were a part of this publicity that surrounded the negotiations?

A: Not a big part. I tried to keep to the subject that we were dealing with, the actual cost. I didn't think as a negotiator in the process I should be sending letters to the editor every time something appeared in the paper.

Q: But you did ask others to do it on your behalf?

[70] A: I said if they would, yes. I thought it was a good way, that the thing deserved an answer.

Q: And to your knowledge and recollection, did they do that?

A: Some did, some did.

Q: Now, you said that in addition to individuals writing letters to the newspaper attacking teachers, that certain Board Members would make statements attacking teachers. Can you tell me, specifically, which Board Members made statements attacking teachers?

A: Well, I don't have all of the publicity in front of me, but one of the things they attacked was our salary demand. They knew that we had asked for a ten percent (10%) increase.

Q: When did they do that publicly?

A: That was done the night of our first negotiation.

Q: When was that?

A: We met—our first meeting was in February. I'd have to look up the date—February it was.

Q: And how did you feel about that?

A: It was unheard of.

Q: Did it make you angry?

A: Well, certainly.

Q: Very angry?

[71] A: Just upset. I've gone through negotiations before. I can't get upset about everything I read in the paper.

Q: Was there anything . . .

A: It annoyed me.

Q: Was there anything else that was done during the course of the negotiations which you felt was unprecedented?

A: Things connected with the negotiations, I'd have to think about it—I may not be able to think of it, and the way the negotiations were being conducted.

Q: Were teacher salaries and benefits published in the local newspapers during the course of the negotiations?

A: Yes.

Q: Had that been done previous, to your recollection?

A: Yes, in my career, my salary has been published three (3) different times. I am used to having my salary published, so it didn't bother me, that doesn't bother me as much as it might bother younger teachers. They get upset when other people are making more than their salary.

Q: And did it bother some of your members?

A: It did, yes.

Q: Did they talk to you about it?

[72] A: Oh, yes.

Q: Did you feel an obligation as their representative to do anything about it?

A: Well, what was I going to do?

Q: I am just asking if you felt that there . . .

A: It's the press, but we are public servants. We are paid by taxpayer money, the same as a lot of people, and if they wanted to put our salaries in the paper, I guess there is not much you can do about it. But my salary has been published before, so it didn't bother me at all. I was used to that.

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Q: Now, when these petitions were circulated and signed, did you review the petitions?

A: Yes.

Q: What did you do after you reviewed the petitions?

A: I know the people who signed them. There were a lot of people there that I knew.

Q: Did you talk to any of the people that signed it?

A: Yes.

Q: Who did you talk to, do you remember?

A: No, not really.

[75] Q: Did you talk to several people about it?

A: Yes.

Q: What did you say to them when you talked with them?

A: Well, I told them I was concerned why they had signed it. They used an excuse that they really didn't know what it was.

Q: Did you encourage other members of your Local to review the petition?

A: Oh, absolutely.

Q: And did you encourage them to talk to people that had signed it?

A: If they knew the people, yes.

Q: But if they didn't know the people, did you encourage them . . .

A: No, I don't think so.

Q: Did you ever encourage anybody to call business people that had signed?

A: If it was a business and they knew them, yes.

Q: What did you encourage them to say to the business people?

A: Well, if they felt that way about it, the teachers getting overpaid, then they didn't need the teachers' money in the business, the line of work that they were in. A very obvious way to do it, it's the only way unions can [76] react.

Q: How many teachers do you believe you told to do that?

A: A lot.

Q: During what months would you have done that?

A: Again, I don't know, but I told people to get to the source, to the people that signed it.

Q: And to, basically, tell them not to patronize their businesses?

A: Whatever they want to tell them, tell them they were dissatisfied, whatever way they knew how to explain it.

Q: Didn't you say just a moment ago that if they didn't—if they felt that way about teachers, that they didn't need their money?

A: That's what I told the teachers.

Q: Right, to tell the business people?

A: Yes, but that doesn't say they didn't patronize them. I would assume that they didn't patronize them.

Q: And did teachers report back to you that that they had done that?

A: Many of them did, yes.

Q: Did you encourage them to do anything other just told me?

[77] A: If our teachers saw the name of a business person and it got around, let's say a restaurant owner that would be getting thousands of dollars from the teachers, both at private parties, faculty parties, different things the school had, and he signed it, he knew we were concerned.

Q: How did he know?

A: The teachers called him. The teachers did it on their own. In some cases, they had a party and they cancelled the party.

Q: Did you ever have a meeting at which you discussed calling these people?

A: I may have.

Q: Did you?

A: I may have. I don't know. I have a lot of meetings with my teachers.

Q: Do you have any specific recollection of encouraging teachers to make those types of calls in a meeting?

A: I did it as a matter of course. Everybody felt the same way, it wasn't—they didn't need much encouragement from me, because they were very upset when they saw names of their family physician, you know.

Q: What would you have encouraged them to tell their family physician?

[78] A: They were upset. That a guy that is making four hundred and fifty thousand dollars ($450,000) a year is upset with somebody that's making thirty-five thousand dollars ($35,000) a year.

Q: Would you have encouraged the people to tell the physician that they were going to go elsewhere?

A: That was up to them, that was up to the individual.

Q: Did you ever encourage . . .

A: Some did that, too.

Q: Did you ever encourage them to do that?

A: I can't recall that I told them to do that.

Q: Do you recall encouraging them to do that?

A: If they felt that that was what had to be done, that was fine with me.

Q: Is that what you told them?

A: Yes. Well, it was just some way to fight back after what they did with the petition.

Q: I am just asking you what you said, that's all, and you told me you didn't remember . . .

A: Sometimes I—I told them to do what they had to do. My members pretty much understand what I say to them. I don't have to spell it out to them.

Q: Did you ever encourage your teachers to call business people or physicians or other people in the [79] community who had signed these petitions, at home?

A: At their home?

Q: Yes.

A: Not that I know of, no. Not that I recall.

Q: Did you ever encourage members of your union to talk to members—let me see if I can phrase that a little better did you ever encourage members of your union to talk to family members of people who had signed the petition?

A: Oh, yes.

Q: And would you characterize that as a matter of course, as well?

A: Of what?

Q: Of course. You said previously that you just did that as a matter of course?

A: Yes.

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Deposition Testimony of Teresa Elison, August 22, 1995

[8] By Mr. Brobst [Attorney for Defendants Frederick W. Vopper, et al.]:

* * * *

Q. Let me show you what's been previously marked as Deposition Exhibit 1, and ask if you can tell me, for the record, what that is.

A. This is a piece of what we would refer to as collateral, which is handed out to customers, giving them some education on how—you know, how and what to expect from their cellular service. Includes, you know, how customer calling features would work, how [9] their bill may look, different areas where they can use their phone in a roaming situation, and what numbers to contact to establish that service.

Q. At the time that a customer purchases your service, is he given a copy of the current customer guide?

A. Yes.

* * * *

[11]

* * * *

Q. Are your sales staff people directed to make any comments about the privacy or security of phone conversations when using a cellular phone?

A. To my knowledge, they're not directed to do so, no.

Q. So they don't bring up the topic unless the customer asks, basically?

A. I'm sure if the customer asks, they would be able to respond, but I don't think, typically, that that's part of the sales presentation.

Q. And you are aware of what the company answer, if that's the right word, is to those kind of inquiries, what kind of response they are to give? Is it along the lines that Mr. Horinko testified?

A. I'm not—to answer your question. I don't know what their response would be. If I had to make [12] an educated guess of how they would respond, it would not be to the technical degree that Mark answered it. It would be more to what's in the customer guide.

* * * *

[18]

* * * *

Q. Did you ever receive, to your knowledge, or did your company ever receive any complaints or inquiry from Edward Bartnicki or Gloria Bartnicki?

A. I don't recall the name at the time. I believe it was Gloria. I guess that she's the one; I'm not sure.

Q. She was the one who in this case had her conversation apparently recorded. So, do you remember—can you relate to me the substance of that conversation as you recollect it, what she said to you, what you said to her?

A. I believe we spoke maybe two, possibly three times. The first time she had called in, it was towards the end of the day, and she wanted to know if it was possible that a cellular phone conversation could be intercepted. At that point I didn't know how to answer it, or was not, you know, technically aware of how to answer it. We hung up, and based on that, she was going to call me back in a few minutes, after [19] I had checked with some of our people to find out if it was possible.

I believe, at that point, I had contacted our general manager and asked if he had knowledge whether it could be

intercepted. His answer to me was that yes, he thought it could be, but what was involved in doing so, he didn't even know.

Q. And who was your general manager?

A. Still, current general manager is Vince Hedrick. I believe Gloria contacted me back, and I told her at that point that yes, we thought it would be possible, but we were trying to contact some of our switch personnel, our technical personnel, to find out what needed to happen or what was involved in having those conversations; could it be one-way, could it be two-way.

I don't recall whether we spoke to our technical people that night or the next morning and clarified it, that, again, it was possible to be done. The equipment involved would need to be sophisticated, that there is—I know I definitely relayed to her that there was two different frequencies that were being transmitted at the time, and the equipment being used would have to adapt to both sets of frequencies in order to hear the completed conversation. And to [20] my knowledge. I think that's the last time we spoke about it.

a. Did you mention to her, you know, the type of equipment somebody would—could possibly have to do this? For example, you mentioned to her a scanner.

A. I may have used the word scanner. Outside of that. I would't know what specific equipment would have needed to be used, no.

* * * *

[22]

* * * *

Q. Did she indicate to you she was surprised that someone would have been able to do this?

A. I don't know that she indicated that. It may—I would have to draw, I guess, assumption that she was excited about it.

Q. She was upset about it?

A. Right, that it was probably surprising to her.

* * * *

[28] By Mr. Aritz [Attorney for Defendant Jack Yocum]:

* * * *

Q. I take it from your earlier testimony that when Gloria Bartnicki, for example, called you and asked you if these calls could be intercepted, you had to think about that for a while, and then you deferred to someone else. You called and—I think you said you called your service person or manager or whatever and asked then if it could be done?

A. Yes.

Q. So you didn't really answer her specifically or directly; you wanted to make sure that you had the right answer for her?

A. Yes.

Q. But if you look—I'm just looking at Exhibit 2, which is the service order relative to the Bartnicki phone. which was dated back July 28 of '89. And if you look at Paragraph 10 on the "Terms and Conditions" portion, which reads "Privacy: Customers advised and acknowledges that phone calls made on [29] company cellular telephone network are broadcast over the airways and may be intercepted and overheard by third parties without the knowledge of customers and the other parties to customer's phone calls." So it would be pretty clear, even back in '89 that your company made that well-known to any customer who had purchased service or equipment that it can be intercepted because of they're over the airwaves?

Mr. WENDOLOWSKI: Object to the form.

A. Yes.

* * * *

[34] By Mr. Wendolowski (Attorney for Defendants Frederick W. Vopper, et al.]:

* * * *

Q. If I can direct you to Exhibit 1, the manual, on Page 11, the section that talks about privacy.

A. Yes.

Q. First of all, with regard to this manual itself, Mrs. Elison, this is a document that the company gives to its customers?

A. Yes.

Q. If I can direct you to the first sentence under "Privacy", it reads as follows: "It is illegal [35] to monitor a cellular phone conversation." It would be fair to say that, by inserting this language in this document, the company was attempting to instill in its customers the idea that it is illegal to tape these conversations—or to intercept these conversations?

* * * *

A. And I'm not sure I can answer your question. That section was probably written under the advice of our legal counsel. What they were attempting to accomplish at that point, I don't know.

Q. And how about the next sentence, where it says "It is also extremely difficult."

A. Uh-huh.

Q. What was the company attempting to convey to the customers by including that?

[36] A. Again. I don't know. It was—you'd have to find the party or parties that came up with that specific verbiage, and what their attempt was at that time.

Q. Look at the second paragraph of that. It says, after the first comma, ". . . it is highly unlikely that anyone attempting to monitor your conversation could locate your assigned channel."

A. Uh-huh.

Q. Do you see that language?

A. Yes.

MR. BROBST: What's the—

MR. WENDOLOWSKI: I'm just directing her attention.

MR. BROBST: Oh, okay.

Q. What's your understanding of what the company is communicating to its customers with regard to that language?

MR. BROBST: I have the same objection.

Q. You can answer.

A. Are you asking for my impression or what the company is trying to give to the customer?

Q. Well, let me break it down both ways. First let me ask for your impression; then we'll ask as a representative of the company.

[37] MR. BROBST: I object to the form of the question.

Q. You can answer.

A. I can't answer the part of what the company is trying to represent, because again, I don't know who wrote it or what the intent was. Personally, if I were reading this, it would tell me that it was difficult for someone who's attempting to monitor my phone conversation to be able to do so.

Q. Assuming you were a customer and read this language under the privacy section, would you have an expectation that your telephone conversation on your cellular phone was private?

MR. BROBST: Objection to the form of the question.

A. Myself personally, no. I don't think I would make that assumption. I know, I may. That's almost a conflict, for me to pretend I'm a customer but be a company representative.

* * * *

[38]

* * * *

Q. What is your position with the company?

A. Currently? Internal Procedures Manager.

Q. And how about when Ms. Bartnicki first spoke with you?

A. I'm not sure of the time frame. I could have been the Customer Operations manager.

Q. So it would be fair to say that you then, as Customer Operations Manager, back when you first spoke to Gloria Bartnicki, and that's manager of Cellular One, were somewhat surprised with regard to the fact that this conversation was intercepted.

MR. BROBST: Objection to the form of the question.

A. Yeah, and I don't know that surprise would be the word I would use. I've known, since the onset of my employment with Cellular One. you're dealing with radio frequencies. How it could occur or what [39] equipment could be involved to make it occur is what I needed to go find out in order to answer what I thought was satisfactory to Gloria's question.

* * * *

[40]

* * * *

Q. Do you have any personal knowledge of anyone at Cellular One, at any point Ms. Bartnicki's conversation being intercepted, communicating to her the fact that her conversation could be intercepted?

A. To my knowledge, no.

Deposition Testimony of Kathryn Bozinski, August 22, 1995

[12] By Mr. Aritz [Attorney for Defendant Jack Yocum]:

* * * *

And at some point as I was formulating the story to be on the 6 o'clock news, given the nature of the tape, the [13] question as to the authenticity of it, and as well as the means by which it was gained. I consulted with two members of the staff, and we listened to the tape at that time, in an audio production room.

Q. And who did you consult with?

A. With John Bendick, our assignment editor, and Keith Martin, the anchorman.

Q. And after your consultation with those two gentlemen, what was the decision made concerning what you were going to do with this tape?

A. I believe that John Bendick may have consulted our attorney, Mr. Brobst, as to how it should be dealt with. At this point we decided not to play specific excerpts from the tape, but we did graphically, which means in letters on the screen, with me reading the graphic, quote a segment—either one segment or—I think only one segment from the tape, but we did not actually play, at full volume, the tape itself, on the air.

Q. Do you remember what segment you graphically put on the screen?

A. Yes, it was the reference to blowing off porches of school directors.

Q. Now, in your capacity as a newsperson, did you consider this tape newsworthy?

[14] A. Yes.

Q. That—would be fair to say why Mr. Bendick had dispatched you to WILK, so you could get a copy of this tape?

A. Yes.

* * * *

Deposition Testimony of Mark Horinko, August 22, 1995 [15]

By Mr. Brobst [Attorney for Defendants Frederick W. Vopper, et al.]:

* * * *

Q. Okay. How else could it be intercepted, a signal from the car to the tower?

A. And I'm not specific on the dates; you probably know better than me, but within my ten years in the industry, there was a point in time that you [16] could buy scanners off the shelf that would intercept cellular telephone calls. I don't know what the date was, but I know today when you buy a scanner, those particular frequencies are not available within the scanners.

Q. So when they buy the scanner, the frequencies that they use for the cellular phone transmissions, they don't put into the scanner?

A. That's correct.

Q. Do you know what the date was when they made that change?

A. I don't. I really don't.

Q. But the older scanners that people still own would still have the ability to intercept that radio signal between the car and the tower; is that correct?

A. That's correct.

Q. And I guess somebody could buy a scanner and if they knew something about electronics, they could adapt it so that they could get those frequencies; is that correct?

A. That happens—yeah, I've seen that happen.

Q. And when you say "scanner," could you just, for the record, explain what you mean by a scanner?

A. It's a receiving unit that would interpret radio frequencies off the air to intelligent [17] conversation.

Q. So it would just pick up whatever radio signal was within its range of the scanner when they had it on, at random?

A. That's correct. The only other device I know that would be able to do that would be older televisions that had UHF dials, given that the frequencies that were allocated for cellular came from TV UHF channels.

Q. Could you explain, for the record, that the UHF channels were? How did they work? I mean, what was a UHF channel?

A. UHF was used for television. and I want to say it's from like channel 69 to maybe channel 90, and I'm not specific what channels they were. I want to say they were Channels 80 and 81, that the FCC took from television and gave to cellular. So older televisions, before cables, that still had the manual tunes, you could tune in cellular telephone conversations.

Q. Again, would you just get those at random or by just having the TV on, tuned to those channels? Would you have to do something else to—

A. You'd have to turn to those particular channels and fine-tune to intercept a telephone [18] conversation.

Q. When you say "fine-tune," what would you have to fine-tune?

A. I mean, just to—the knobs. In the older televisions. They used to have a tuning device on the television.

Q. The purpose of which was to—when you say tune, what were they tuning? They were trying to—I mean, once you turn to the channel—

A. Oh, it was originally designed for tuning in television stations or channels.

Q. Oh. You mean, after you got it on the right channel, just to make the picture better?

A. That's correct.

Q. In other words, to get the signal tuned into the TV better, if that's the right word?

A. Yep.

Q. Okay. And so there are—do you know when they stopped making those—I'm sorry, strike that. Do you know when the FCC took those UHF channels and reassigned them—

A. To cellular—

Q. —to cellular from TV?

A. Cellular started in the 1983, '94 (sic)—yeah. '83, '84 time frame. So I would say, you know, [19] venture a guess that it was somewhere in that time frame that the FCC reallocated that spectrum.

* * * *

[21]

* * * *

Q. Now, would it be possible for someone to focus on a particular individual as opposed to doing this at random? You know, just picking up phone calls at random? If you wanted to try to monitor the cellular phone calls of a particular individual, a particular car, for example, is there any way you could do that?

A. No, there's no specific means to target an individual by off-air monitoring, no.

Q. In this case. We have a case where there was a phone conversation recorded by a person who was using a car phone, sending it back to a person either, he said, at his home or office, not using a cellular phone. And not only did they intercept it. but they were able to record it. And basically, you're [22] indicating to me that they must have discovered that conversation by accident, by random, as opposed to some way being able to have focused on it in same way, you know, focusing on that person?

A. Yeah. I mean, it would have to be at random, beause the channel selection algorithms that we use in our sites, you know, to pick channels out is pretty much a random process.

Q. So, as I understand your testimony, you're saying that it would be very difficult to try to focus on a particular person and intrcept their phone calls; is that correct?

A. On a particular individual.

Q. Right. But I also understand you're saying it would be very easy just to randomly listen to cellular phone conversations?

A. That's correct.

* * * *

[28]

* * * *

Q. But it would be a lot easier though, obviously, it you lived in an area where there was a tower with only eight or nine channels, to monitor anybody's conversation passing through that particular area?

A. Yeah. And within those—again, we can use any eight of 350 channels on that site.

Q. Right. What do you mean any eight of 3—oh, oh, okay.

A. We have 350 different channel assignments that we could use, any eight of those.

Q. So they'd have to figure out which eight you're using in that area. Now, does that change from time to time, or do you have the same eight channels, say, assigned to a particular tower all the time?

A. They change—you know, maybe every three to six months, we change channel assignments.

Q. So every three to six months, you change the channel assignments for a particular tower area?

A. Yep.

[29] Q. And that's on all your towers?

A. That's correct.

Q. And that's done in order to try to—strike that. Why is that done?

A. Just to—for capacity, as you—you know, to allow us to reuse frequencies as we bring on new sites. We might have to use a set of frequencies or set of channels on Site A, and we'll use the same channels on Site D. Okay? So, you know, we reuse those same channels over and over again.

Q. Now, as you're traveling and the signal gets handed off to the next tower, does the channel change, or would it be handed off, at first, to the same channel?

A. No, the channels will change as the call is handed from site to site.

Q. So if I'm listening in on a phone conversation, and the caller gets to the point where that signal's handed off to the next tower, I will lose that conversation at that point?

A. That's correct.

Q. I'll have to then find—

A. You'd have to—

Q. —what the new channel is that it's now on; is that correct?

[30] A. That's correct.

* * * *

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Nos. 99-1687 and 99-1728

In the Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PETITIONERS

v.

FREDERICK W. VOPPER, AKA FRED WILLIAMS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., were plaintiffs in the district court and appellees in the court of appeals. Petitioner United States of America appeared as an intervenor of right in the court of appeals pursuant to 28 U.S.C. 2403(a). Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; Lackazerne, Inc., d/b/a WGBI Radio; and Jack Yocum were defendants in the district court and appellants in the court of appeals.

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In the Supreme Court of the United States

No. 99-1687

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v.

FREDERICK W. VOPPER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a[1]) is reported at 200 F.3d 109. The opinions and orders of the district court (Pet. App. 59a-68a, 69a, 70a-74a, 75a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1999. The petitions for rehearing were denied on February 25, 2000. The petitions for writs of certiorari

[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in *United States* v. *Vopper*, No. 99-1728.

were granted on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*, are set forth in an appendix, *infra*, at 1a-10a.

STATEMENT

This case involves a constitutional challenge to provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* (Title III), the principal federal wiretapping statute. Title III generally prohibits the interception of wire, oral, and electronic communications. The provisions at issue in this case—18 U.S.C. 2511(1)(c) and (d)—bar use and disclosure of the contents of illegally intercepted communications by any person who knows or has reason to know that the communications were intercepted in violation of Title III.

1. Congress enacted Title III in 1968 in response to the widespread perception that technology was rapidly eroding the security of otherwise private means of communication. As the Senate Report on Title III explained, "tremendous scientific and technological developments" had made possible "widespread use and abuse of electronic surveillance"; as a result, the privacy of communications was being "seriously jeopardized." See S. Rep. No. 1097, 90th Cong., 2d Sess. 67 (1968) (1968 Senate Report). The 1968 Senate Report continued:

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Ibid.

The importance of offering protection against such intrusions was underscored in the 1967 report of the President's Commission on Law Enforcement and Administration of Justice, which was influential in the development of wiretap legislation. See *United States* v. *Giordano*, 416 U.S. 505, 517-518 n.7 (1974); *United States* v. *Jones*, 542 F.2d 661, 667 n.10 (6th Cir. 1976). See also 1968 Senate Report 67. The Commission observed:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967). "[E]lectronic surveillance," the report noted, was being used by "numerous private persons" "to carry on industrial espionage," "to assist in preparing for civil litigation," to conduct "personnel investigations," and for other purposes. *Ibid.*

Electronic surveillance has also been understood to threaten the development of new and vital channels of communication. While "[a] letter sent by first class mail is afforded a high level of protection," S. Rep. No. 541, 99th

Cong., 2d Sess. 5 (1986), and "from the beginning of our history, first-class mail has had the reputation for preserving privacy, while at the same time promoting commerce," *Electronic Communications Privacy Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 4 (1985 & 1986) (*ECPA Hearings*), that same guarantee of privacy was absent with respect to the mails' "new technological equivalents." *Id.* at 2 (statement of Sen. Kastenmeier). See also *id.* at 4 ("We cannot let any American feel less confident in putting information into an electronic mail network than he or she would in putting it into an envelope and dropping it off at the post office.").

To address those concerns, Title III provides a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972). See also Pub. L. No. 90-351, Tit. III, § 801, 82 Stat. 211 (Title III designed "to protect effectively the privacy of oral and wire communications"). Title III bars the unauthorized acquisition of wire, oral, and electronic communications through the use of electronic, mechanical, and other devices. Specifically, Section 2511(1)(a) provides that, "[e]xcept as otherwise specifically provided" in Title III, it is unlawful for "any person" to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." See also 18 U.S.C. 2510(4) (defining the term "intercept" to mean acquisition of a "communication through the use of any electronic, mechanical, or other device.").[2] Sections 2516 and 2518, in turn, set forth

[2] As enacted in 1968, Title III applied only to wire and oral communications. See Pub. L. No. 90-351, Tit. III, § 802, 82 Stat. 212. Consequently, for some time it was unsettled whether Title III's definition of "wire communication" reached the radio portion of cellular telephone communications. See, *e.g.*, *Edwards* v. *State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987). In 1986, however, Congress amended Title III to clarify that Title III extends to communications on cellular and other wireless telephone systems, see 18 U.S.C. 2510(1). At the same time, Congress extended Title III to cover the electronic transmission of non-voice data such as electronic mail and other Internet communications. See 18 U.S.C. 2510(12) (1994 & Supp. IV 1998). See generally Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848; S. Rep. No. 541, *supra*, at 1-3, 7-8, 11.

the procedures that must be employed, and the substantive criteria that must be met, before a wiretap or other form of electronic surveillance may be authorized under Title III. 18 U.S.C. 2516, 2518 (1994 & Supp. IV 1998). As this Court has explained, Section 2511(1)(a) is designed "effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral[,] [electronic,] and wire communications, except those specifically provided for in the Act." *Giordano*, 416 U.S. at 514.

In framing Title III, Congress concluded that merely prohibiting interceptions would not be sufficient. It observed that "[o]nly by striking at all aspects of the problem" could "privacy be adequately protected." 1968 Senate Report 69. Accordingly, Congress reinforced the prohibition on unauthorized interception with several related restrictions. For example, Congress banned the possession, shipment, sale, manufacture, and advertisement of listening devices where the device's design "renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications." 18 U.S.C. 2512. And it prohibited the use of the contents of illegally intercepted communications as evidence in any proceeding, including criminal prosecutions. 18 U.S.C. 2515.

In 18 U.S.C. 2511(1)(c) and (d), Congress also prohibited use and disclosure of the contents of illegally intercepted communications. Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to

disclose, to any other person the contents of any wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that the information "was obtained through the interception of a wire, oral, or electronic communication in violation of" Title III. Section 2511(1)(d) makes it unlawful for any person with the same knowledge to "intentionally use[], or endeavor[] to use, the contents of any wire, oral, or electronic communication." Taken together, those two provisions proscribe all unauthorized uses of illegally intercepted communications by anyone with knowledge or reason to know of their unlawful origin. See also 50 U.S.C. 1809 (similar prohibition); 47 U.S.C. 605 (1994 & Supp. IV 1998) (barring divulgence of private wire and radio communications to individuals other than the addressee).

Violations of Title III may be prosecuted as criminal offenses or result in the imposition of civil fines. 18 U.S.C. 2511(4) and (5). Title III also provides a private cause of action for any person whose communication is intercepted, disclosed, or used in violation of the statute. 18 U.S.C. 2520(a). In a civil action under Title III, a court may award "such * * * relief as may be appropriate," including declaratory and injunctive relief, compensatory damages or prescribed statutory damages, and punitive damages "in appropriate cases." 18 U.S.C. 2520(b) and (c).

2. This case arises out of the illegal interception of a telephone conversation between Gloria Bartnicki, the chief negotiator for a Pennsylvania teachers union, and Anthony Kane, the union's president. The union was engaged in contract negotiations with a local school board, and Bartnicki and Kane held a confidential telephone conversation in which they discussed the status of the negotiations; Bartnicki used a cellular telephone. Pet. App. 3a. Both the confidential nature of the conversation, and the fact that Bartnicki was using a car phone, were obvious from the conversation itself.

See J.A. 43 ("[T]his is very confidential."); J.A. 42 (indicating that Bartnicki was in her car).

An unknown person intercepted the conversation, recorded it, and anonymously delivered a copy of the recording to respondent Jack Yocum. Yocum was president of a local taxpayers' association, formed for the purpose of opposing the union's bargaining demands. Pet. App. 3a. Yocum listened to the recording, recognized Bartnicki's and Kane's voices, and heard provocative remarks about the school board. *Ibid.*[3]

Although Yocum has stated that the contents of the recording caused him to become concerned about the safety of school board members, he did not turn the tape over to the police. J.A. 54, 118. Instead, he gave a copy to respondent Frederick Vopper, the host of a local radio talk show, so that Vopper would "make it public." J.A. 118; see Pet. App. 3a-4a. Yocum also played the tape for several school board members. J.A. 116-117. Respondent Vopper retained the tape for several months, J.A. 76; Pet. App. 55a-56a n.6 (Pollak, J., dissenting), but eventually played it on his program repeatedly, Pet. App. 4a; J.A. 20, 39, 64. The program was broadcast by two local radio stations, respondent station WILK and respondent station WGBI. Pet. App. 4a.

Bartnicki and Kane filed this action in the United States District Court for the Middle District of Pennsylvania against Yocum and Vopper, as well as the respondent radio stations, under Title III, 18 U.S.C. 2520, and a parallel provision of Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 5701 *et seq.* (West 1983). They asserted that respondents had disclosed and used the taped conversation, knowing or having reason to know that it had been intercepted unlaw-

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[3] During the phone call, Kane stated that, if the school board did not offer more than a three percent raise, the union would have to "go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys." J.A. 46.

fully, in violation of 18 U.S.C. 2511(1)(c) and (d), and in violation of the corresponding provisions of Pennsylvania law, 18 Pa. Cons. Stat. Ann. § 5725 (West 1983 & Supp. 1999). See J.A. 12, 15, 17. Bartnicki and Kane seek statutory and punitive damages.[4]

Respondents sought summary judgment, arguing that application of Title III and the Pennsylvania statute to their actions would violate the First Amendment. They asserted that, where a private conversation involving matters of public significance is illegally intercepted and recorded through an electronic eavesdropping device, third parties have a constitutional right to disclose the contents of the conversation so long as they were not responsible for the initial interception. Pet. App. 65a; see also *id.* at 74a. The district court denied respondents' motion, holding, *inter alia*, that the application of Title III to respondents does not violate the First Amendment. Pet. App. 65a-67a, 74a. The district court then certified the First Amendment issue for interlocutory appeal under 28 U.S.C. 1292(b), Pet. App. 75a-76a, and respondents filed a petition for interlocutory review, *id.* at 5a.

3. After the court of appeals heard oral argument, it notified the Attorney General that the constitutionality of 18 U.S.C. 2511(1)(c) and (d) was at issue; the court invited the United States to present its views. Pet. App. 77a-79a; see 28 U.S.C. 2403(a).[5] The United States intervened and filed a brief to defend those provisions. Pet. App. 5a.

[4] Although Bartnicki and Kane's complaint prays for compensatory damages, J.A. 18, the parties have stipulated to dismissal of that request, J.A. 130. Accordingly, this case does not present any question concerning the propriety or proper measure of compensatory damages.

[5] Under 28 U.S.C. 2403(a), when the constitutionality of an Act of Congress is drawn into question in a federal suit to which the United States is not a party, federal courts are required to notify the Attorney General and to permit the United States to intervene with "all the rights of a party" to defend the constitutionality of the statute.

A divided panel of the court of appeals reversed. Pet. App. 1a-58a. The court framed the issue as "whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants * * * played no direct or indirect role in the interception." *Id.* at 2a. The court of appeals concluded that 18 U.S.C. 2511(1)(c) and (d), and the corresponding provisions of Pennsylvania law, are "content neutral" and therefore subject to intermediate rather than strict constitutional scrutiny. Pet. App. 17a-28a. But it held that Title III does not meet that standard of judicial review when applied to "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged th[e] interception." *Id.* at 42a.

The court of appeals rejected the government's contention that Title III's bar on the use and dissemination of illegally intercepted conversations is needed to diminish the demand for such materials and thus to decrease the incentive for illegal interceptions. Pet. App. 33a-36a. "The connection between prohibiting third parties from using or disclosing" such communications and "preventing the initial interception," the court of appeals stated, is too "indirect." *Id.* at 33a. The government's interest in protecting privacy and ensuring public confidence in the integrity of communications, the court of appeals found, "can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* at 35a.

The court of appeals also rejected the government's contention that Title III's use and disclosure prohibition serves the legitimate interest of protecting individuals from the further injury that occurs when illegally intercepted commu-

nications are disclosed to additional parties or otherwise used. See Pet. App. 26a-27a. The court stated that protecting "intimate" facts from public disclosure is not a cognizable interest for purposes of intermediate scrutiny because, in the court's view, it turns on the communicative impact of the information being disclosed. *Id.* at 27a.

Finally, the court of appeals expressed concern that Section 2511(1)(c) and (d)'s prohibition might chill free expression. Pet. App. 36a. The threat of liability, the court stated, might deter the media from publishing material that was not in fact obtained in violation of Title III when the information's origin is unclear. *Ibid.*

Judge Pollak (Senior D.J., sitting by designation) dissented. Pet. App. 42a-58a. Judge Pollak agreed that intermediate scrutiny is appropriate, but he "part[ed] company" with the majority on the proper application of that standard to Title III. *Id.* at 47a. He explained that, without the prohibition on disclosure, there would be an incentive to conduct illegal interceptions and the damage from such violations would be "compounded." *Id.* at 50a-51a. Judge Pollak concluded that the "First Amendment values on which [respondents] take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable—indeed kindred—dimension." *Id.* at 58a.

The United States and the plaintiffs filed petitions for rehearing en banc. The court denied rehearing en banc by a 6-5 vote. Pet. App. 82a-83a.

SUMMARY OF ARGUMENT

Title III renders it unlawful for any person to use or disclose the contents of a wire, oral, or electronic communication when the person knows or has reason to know that the communication was intercepted in violation of federal wiretapping law. The court of appeals held that this restriction on speech violates the First Amendment as applied to

the facts of this case, which involves the illegal interception and tape-recording of a private, cellular telephone call between union officials followed by the public broadcast of the tape on radio stations. The court of appeals' holding is incorrect. It rests on a misapprehension about the substantial interests that Title III serves in protecting privacy, fostering new technologies for communications, and safeguarding uninhibited private communications. And it overstates the incidental effect on speech.

I. Title III is subject to intermediate scrutiny under the First Amendment. Where, as here, a generally applicable law burdens speech not for the purpose of excising ideas or information from public or private debate, but instead to promote legitimate regulatory aims unrelated to the communicative impact of the regulated activity, the Court applies at most an intermediate level of scrutiny. Under that approach, a law is valid if it furthers an important government interest that is unrelated to the suppression of free expression, and if the incidental restriction on speech is no greater than necessary to promote that interest. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

The restrictions in Title III are properly evaluated under intermediate scrutiny, as the court of appeals held in this case. The critical inquiry is whether the law is designed to "stifle[] speech on account of its message," or instead fulfills regulatory goals independent of the message of the speech. *Turner*, 512 U.S. at 641. Here, three central attributes of Title III show that its purpose is not to trammel speech because of disagreement with the message it may convey.

First, Title III is a content-neutral provision. The statute, on its face, draws no distinctions as to subject matter or viewpoint; it instead applies to "the contents of any wire, oral, or electronic communication." 18 U.S.C. 2511(1)(c) and (d). The impartiality of those prohibitions reveals a legis-

lative design to protect all private communications against unlawful intrusions, not to suppress any particular type of speech. As such, the restrictions are "*justified* without reference to the content of the regulated speech," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), and turn only on the illegal source of the communications at issue. See *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 30-34 (1984) (applying intermediate scrutiny to a law that restricted speech based on the source, rather than the subject matter, of the information at issue).

Second, Title III is generally applicable to all uses of illegally intercepted communications, including non-expressive uses, where the individual has the requisite degree of knowledge of the illegal source. Title III prohibits uses of illegally intercepted communications in competing with a business rival or in trading in securities; it bars use of such communications in an extortionate scheme; and it has been construed to bar uses of illegally intercepted communications in criminal and regulatory investigations. The combined prohibition against all "uses" in Section 2511(1)(d) and all "disclos[ures]" in Section 2511(1)(c) reinforces the conclusion that Congress's intention was not to suppress speech, but to avoid the harms to privacy, free expression, and technological innovation that flow from exploitation of illegal surveillance of communications. The general applicability of a law is a feature that makes strict scrutiny inappropriate. See *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669-672 (1991); see also *Hill* v. *Colorado*, 120 S. Ct. 2480, 2497 (2000); *Turner*, 512 U.S. at 661.

Third, Title III itself furthers the constitutional objective of encouraging free expression. The willingness of individuals to speak freely in private is seriously jeopardized by a constant fear of surveillance and public exposure or misuse of such conversations. Much valuable interchange—personal, philosophical, political, or business—takes place only

because of the spontaneity and candor that can occur when a speaker can select and limit the audience to which his comments are addressed. That is itself a value protected by the First Amendment. See *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 559 (1985). Because Title III furthers that purpose, this is a case in which "constitutionally protected interests lie on both sides of the legal equation," *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (concurring opinion), and intermediate scrutiny is appropriate.

There is no basis for applying to Title III the strict scrutiny standard of *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), and the cases on which *Florida Star* relies, including *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97 (1979). Those cases apply only to the publication of information that was "lawfully obtain[ed]." *Florida Star*, 491 U.S. at 533. The Court specifically reserved cases in which "information has been acquired *unlawfully* by a newspaper or by a source," *id.* at 535 n.8, and it made clear that when "sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired," *id.* at 534. Title III fits within that latter mold. In addition, this Court's cases applying strict scrutiny to restraints on the press dealt with content-based laws forbidding publication of particular facts; laws that focused on speech itself, rather than all uses of information based on its illegal source; and laws often directed at information about governmental processes or released from a governmental source. Title III differs from such laws in all of those respects.

II. Evaluated under the intermediate scrutiny standard, Title III is constitutional. As an initial matter, it furthers two important governmental interests that are unrelated to suppression of free speech. First, it protects against the

aggravated injury to privacy that occurs when illegally intercepted communications are then exploited or publicly disseminated. As the Court has recognized, the later use "compounds the statutorily proscribed invasion of * * * privacy," *Gelbard* v. *United States*, 408 U.S. 41, 52 (1972), and thereby multiplies the chilling effect on private communication inevitably produced by illegal electronic surveillance and interception. Relatedly, Congress wished to foster development of new technologies, such as cellular phones, e-mail, and other computer communications, by assuring the public that those channels will be as secure as the mails. Second, the ban on use and disclosure reinforces the underlying ban on illegal interception. Without barring outlets for taking advantage of illegally intercepted communications, the incentive to engage in them would be significant. Detection of illegal electronic interception is difficult and often unsuccessful. Only by removing the "market" for illegally intercepted communications could Congress effectively deter the underlying misconduct. Cf. *New York* v. *Ferber*, 458 U.S. 747, 759-760 (1982).

Those interests would be substantially less effectively served if Title III's prohibitions were limited to particular communications. Such a limited ban would do nothing to prevent the increased damage to privacy interests that disclosure of any private communication inflicts. It would therefore less effectively remove the chill that electronic surveillance places on communication, particularly with new technologies. For the same reasons, a ban on illegal interception alone would not be sufficient. Moreover, because of the difficulty in detecting illegal surveillance, such a law would enable persons who carry out illegal interceptions to launder information through third parties and thereby reap benefits from the violation. The incentives to engage in illegal interceptions would thus remain high.

There is no basis for concern that the prohibitions of Title III will chill protected speech even when the source of the information is not an illegal interception. Title III's scienter standard requires that a person "know[] or hav[e] reason to know" that the information was obtained through an illegal interception before the prohibitions on use and disclosure apply. 18 U.S.C. 2511(1)(c) and (d). That standard is satisfied only when an individual actually knows of the illegality or is aware of the facts that make the illegal source apparent. It imposes no duty of inquiry on a person to ferret out the provenance of the information. In addition, in other First Amendment contexts, the Court has crafted procedural devices, such as heightened scienter standards, heightened burdens of proof, and de novo appellate review, to avoid unduly chilling protected speech. To the extent that such concerns exist here, those legal devices would be equally capable of dispelling deleterious effects. That result would better balance the privacy and expression interests in this case than would invalidation of Title III's comprehensive legal protections against the dissemination of information acquired through illegal interceptions.

ARGUMENT

TITLE III'S RESTRICTION ON THE USE AND DISCLOSURE OF ILLEGALLY INTERCEPTED COMMUNICATIONS IS CONSISTENT WITH THE FIRST AMENDMENT

At stake in this case are interests of central importance: the interest in privacy and security of wire, oral, and electronic communications, and the interest in free expression protected by the First Amendment. Reconciling those interests requires close examination of the values at issue and the effects of the regulation; no mechanical formulation can substitute for such an inquiry. As this Court recognized in *Florida Star* v. *B.J.F.*, 491 U.S. 524, 533 (1989),

"the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the * * * case."

Title III "protect[s] the privacy of individual thought and expression," *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972), by safeguarding the ability of individuals to communicate without fear of interception, use, and disclosure of their private communications. In affording such protection, Title III builds on the traditional respect in our society for the privacy of personal communications. The statute also reflects the basic principle that those who knowingly come into possession of stolen goods are not free to exploit them. While attaining Title III's purposes can result in the restriction of speech in particular cases, this Court has "pointedly refused" to hold that the publication of truthful information may never "be subjected to civil or criminal liability for invading an area of privacy defined by the State." *Florida Star*, 491 U.S. at 533 (internal quotation marks omitted). Here, liability is imposed, not because of the government's disagreement with the message, or because the government seeks to suppress public knowledge of particular subject matters, but because of the illegality of the source of the information, *i.e.*, an illegally intercepted private communication. Indeed, enforcement of Title III is necessary to assure citizens that they may communicate privately without fear of unwanted and illegal dissemination of their speech. Fostering such speech is itself a First Amendment value.

I. The Application of Title III To Disclosure Of Illegally Intercepted Communications By Persons Other Than The Wiretapper Is Subject To Intermediate Scrutiny

"[B]ecause not every interference with speech triggers the same degree of scrutiny under the First Amendment,"

this Court "must decide at the outset the [appropriate] level of scrutiny." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994). Title III's use and disclosure prohibition is a content-neutral provision of general applicability; it neither singles out a particular category of speech by subject nor singles out speech itself. Accordingly, it is properly analyzed under this Court's intermediate scrutiny standard.[6]

A. Intermediate Scrutiny Is Appropriate Where The Statute Neither Regulates Speech Because Of Its Message Nor Singles Out Speech For Differential Treatment

In order to prevent the government from suppressing unpopular ideas or disfavored views, this Court has consistently subjected to strict scrutiny laws that attempt to "stifle[] speech on account of its message." See, *e.g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1880 (2000); *Reno* v. *ACLU*, 521 U.S. 844 (1997); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). Under that rigorous test, content-based statutes are generally unconstitutional unless they are "narrowly tailored to promote a compelling Government interest." *Playboy*, 120 S. Ct. at 1886.

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[6] The three courts of appeals that have considered the issue have all come to that conclusion. See Pet. App. 28a (intermediate scrutiny appropriate because Title III is "content-neutral" and "does not rely on the communicative impact of speech"); *Boehner* v. *McDermott*, 191 F.3d 463, 467 (D.C. Cir. 1999) (intermediate scrutiny appropriate because Title III contains "generally applicable, content-neutral prohibitions on conduct that create incidental burdens on speech"), petition for cert. pending, No. 99-1709; *Peavy* v. *WFAA-TV*, No. 99-10272, 2000 WL 1051909 (5th Cir. July 31, 2000) (intermediate scrutiny applicable to Title III where defendants had some participation in the illegal interceptions, because the statute is content neutral and imposes an incidental burden on speech). And, in contrast to the court below, both the D.C. Circuit and the Fifth Circuit went on to find Title III's restrictions constitutional as applied to the facts of those cases.

In contrast, laws that regulate speech or other expressive activities for purposes and in a manner unrelated to the message or its communicative impact are subject to intermediate scrutiny. That is because, "in most cases," such laws "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner*, 512 U.S. at 642. Under intermediate scrutiny, a statute is consistent with the First Amendment "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 662 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

The intermediate scrutiny standard originated in *O'Brien*, where the Court upheld a law prohibiting the destruction of draft cards against a First Amendment challenge. O'Brien had argued that the burning of his draft card was a form of protected political expression, a protest against the Vietnam War. See 391 U.S. at 376-386. Applying intermediate scrutiny, the Court rejected his First Amendment claim, holding that the statute furthered important governmental interests unrelated to the suppression of expression and was not unnecessarily broad. *Id.* at 376-382. The Court assumed that "the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment," *id.* at 376, but held that intermediate scrutiny was nevertheless appropriate because "the law punished him for the 'noncommunicative impact of his conduct, and for nothing else.'" *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1392 (2000) (plurality opinion) (quoting *O'Brien*, 391 U.S. at 382).

O'Brien involved a law aimed at conduct that, in particular cases, had a incidental impact on "symbolic speech" or "expressive conduct," *i.e.*, conduct that ordinarily is undertaken for non-expressive purposes, but that may be performed in particular cases to convey a message. See, *e.g.*, *City of Erie*, 120 S. Ct. at 1391, 1395 (plurality opinion); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Since deciding *O'Brien*, the Court has extended that intermediate scrutiny standard to particular First Amendment settings that involve the regulation of "pure speech." See, *e.g.*, *Procunier* v. *Martinez*, 416 U.S. 396, 410-414 (1974). Most notably, *O'Brien* provides the standards that govern the constitutionality of "content-neutral" speech regulations. See, *e.g.*, *Turner*, 512 U.S. at 641-652, 662; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 536-537 (1987). And the *O'Brien* factors correspond to the Court's test for laws that regulate "the time, place, or manner of protected speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); see *Hill* v. *Colorado*, 120 S. Ct. 2480, 2491 (2000).

What unites expressive conduct cases like *O'Brien*, "content-neutral speech regulation" cases like *Turner*, and "time, place, and manner" cases like *Ward*, is that, in each instance, the law is not hostile to a particular message and does not seek to curtail the communicative impact of the expression. Instead, the justification for the law lies in the "noncommunicative impact" of the regulated activity. *O'Brien*, 391 U.S. at 382. To the extent that such laws burden the exchange of ideas and information, the burden is incidental to the government's pursuit of "a legitimate regulatory goal" unrelated to the suppression of speech or the content of the speaker's message. *Turner*, 512 U.S. at 641. Such laws, as this Court explained in *Turner*, "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny." *Id.* at 661.

When deciding whether a law that regulates expression is subject to strict or intermediate scrutiny, the relevant

inquiry is whether the law is designed to "stifle[] speech on account of its message," or, alternatively, reflects the legislature's pursuit of legitimate governmental goals that are unrelated to the message being conveyed. *Turner*, 512 U.S. at 641; *City of Erie*, 120 S. Ct. at 1391 (plurality opinion) ("If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien*," but "[i]f the government interest is related to the content of the expression, * * * then the regulation falls outside the scope of the *O'Brien* test."). The fact that a law is not aimed at the communicative impact of expression does not necessarily mean that the law presents no First Amendment concerns. But laws that are justified without reference to the message, content, or viewpoint of speech "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue," *Turner*, 512 U.S. at 642, and are appropriately held to the less-demanding standard of intermediate scrutiny.

B. Title III Is Subject To Intermediate Scrutiny Because It Is Content Neutral And Has General Applicability

Title III is not directed at suppressing the dissemination of disfavored ideas or information. Indeed, Title III does not single out speech from other activities as a subject for regulation. Instead, it prohibits all uses of illegally intercepted communications, whether or not the use is communicative in nature. And where Title III prohibits disclosure, it does so in a content-neutral fashion. Title III thereby furthers legitimate and substantial interests in ensuring the integrity of vital means of private communication and in promoting free expression through those channels. As such, it is "justified without reference to the content of the regulated speech," *Ward*, 491 U.S. at 791 (emphasis omitted), and is subject to intermediate scrutiny.

1. Title III is inherently content neutral. "[T]he principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner*, 512 U.S. at 642 (internal quotation marks omitted). The "purpose, or justification" of the law is thus the touchstone in ascertaining content neutrality. *Ibid.* "Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (emphasis in original; internal quotation marks omitted).[7]

Neither Title III's text nor its history suggests a purpose of singling out a particular message, speaker, subject, or viewpoint for disfavored treatment. Contrast *Playboy*, 120 S. Ct. at 1885 (statute that singled out particular content and particular speakers). To the contrary, Title III applies to illegal interception of "any wire, oral, or electronic communication." The statute applies without regard to the content, subject matter, or participants in the communication. Title III thus does not reflect an effort by Congress to "suppress, disadvantage, or impose differential burdens upon speech because of its content," *Turner*, 512 U.S. at 642. Instead, Title III's restrictions reflect an impartial legislative judgment that individuals should be able to engage in

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[7] Because the ultimate issue is whether the justification for a regulation turns on the content of the regulated expression, "even a regulation neutral on its face may be content based," and hence subject to strict scrutiny, "if its manifest purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645. Conversely, a law that regulates speech based on its subject matter may nevertheless be deemed content neutral, and therefore subject to intermediate scrutiny, if (for example) it is justified by non-communicative "secondary effects" associated with the speech rather than by the communicative effect of the speech. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-55 (1986); see also *Boos* v. *Barry*, 485 U.S. 312, 320-321 (1988) (plurality opinion).

telephone conversations and other forms of confidential communication without fear that their conversations will be used by third parties without consent. The restrictions are thus "*justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791.

Title III thus does not seek to insulate particular facts or subjects from public scrutiny. Contrast *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 489 (1975) (tort of publication of private facts). Nor does liability under Title III depend on the communicative impact of the use to which the intercepted communication is put. See *ibid.* Instead, liability depends solely on the *means* by which a communication is obtained—*i.e.*, whether or not the communication was obtained through illegal electronic surveillance. As the D.C. Circuit has explained, Title III "identifies matters" that the statute covers "by reference not to their content, but instead to the process by which they are collected." *Lam Lek Chong* v. *United States Drug Enforcement Admin.*, 929 F.2d 729, 733 (D.C. Cir. 1991). Consequently, an individual who obtains the *identical* content from a lawful source is free under Title III to disseminate or make any use of it he chooses.

This Court has previously applied intermediate scrutiny to a restriction on speech that was based on the source of the information, while leaving unrestricted the dissemination of the same facts if acquired by an independent lawful means. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 30-34 (1984), a media defendant was placed under a protective order in a civil action that prohibited it from disclosing discovery information obtained from the plaintiffs. The defendant claimed that the protective order was subject to strict scrutiny, but this Court disagreed. *Id.* at 32. The Court explained that "such a protective order prevents a party from disseminating only that information obtained through use of the discovery process" while leaving the party free to "disseminate the identical information covered by the protective

order as long as the information is gained through means independent of the court's processes." *Id.* at 34. Thus, the protective order "implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Ibid.*

Because liability under Section 2511(1)(c) and (d) is tied to a particular means of acquisition (illegal electronic surveillance), rather than to a particular category of information, and because liability is not contingent on the communicative impact of disclosure, Title III's object is not to exclude a category of information from the public domain or otherwise inhibit free debate. It may be that Title III's restrictions will occasionally prevent the news media or other persons from providing specific information to the public in particular instances. But so too does Title III's underlying prohibition on wiretapping. See *Branzburg* v. *Hayes*, 408 U.S. 665, 691 (1972) ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune [under the First Amendment] from conviction for such conduct, whatever the impact on the flow of news."). The fact that some information may not be lawfully revealed under Title III because it was acquired in an illegal interception does not make the statute subject to strict scrutiny for regulations "that stifle[] speech on account of its message," *Turner*, 512 U.S. at 641; rather, that incidental effect on speech must be judged under the intermediate scrutiny of the *O'Brien* test.

2. Title III should also be subjected to intermediate scrutiny because it imposes a general prohibition on the use of illegally intercepted communications, and does not apply only to communicative activities. The statutory prohibitions on disclosure and use, 18 U.S.C. 2511(1)(c) and (d), together reflect a single congressional aim to bar *all* exploitation of illegally intercepted communications when the recipient

knows or has reason to know of the illegal source. Consequently, it is unlawful for a company to use an illegally intercepted communication about a business rival in order to create a competing product; it is unlawful for an investor to use illegally intercepted communications in trading in securities; it is unlawful for a union to use an illegally intercepted communication about management (or vice versa) to prepare strategy for contract negotiations; it is unlawful for a supervisor to use information in an illegally recorded conversation to discipline a subordinate; and it is unlawful for a blackmailer to use an illegally intercepted communication for purposes of extortion. See, *e.g.*, 1968 Senate Report 67 (corporate and labor-management uses); *Fultz* v. *Gilliam*, 942 F.2d 396, 400 n.4 (6th Cir. 1991) (extortion); *Dorris* v. *Absher*, 959 F. Supp. 813, 815-817 (M.D. Tenn. 1997) (workplace discipline), aff'd in part, rev'd in part, 179 F.3d 420 (6th Cir. 1999). The statute has also been held to bar the use of illegally intercepted communications for important and socially valuable purposes. See *In re Grand Jury*, 111 F.3d 1066, 1077-1079 (3d Cir. 1997) (Sections 2511 and 2515 prohibit disclosure of illegally recorded conversation to grand jury, even where such disclosure would be in compliance with subpoena); *Berry* v. *Funk*, 146 F.3d 1003, 1011-1013 (D.C. Cir. 1998) (Section 2511 prohibits knowing investigatory use of unlawfully intercepted communications by Inspector General); *Chandler* v. *United States Army*, 125 F.3d 1296, 1298-1302 (9th Cir. 1997) (Section 2511 prohibits United States Army from using taped conversation to investigate charge of adultery).

It does not undermine the generality of Title III's prohibition that Congress addressed disclosure and other uses of illegally intercepted communications in separate subsections of 18 U.S.C. 2511. The statutory bar created by Section 2511(1)(c) and (d) is identical in scope and operation to a unitary, undifferentiated prohibition on use. Indeed, the

only difference is one of clarity: by breaking the prohibition into separate provisions, Congress underscored that the prohibition is not limited to non-communicative uses, but extends to "disclosure" as well. The essential fact is that Congress has not singled out disclosure from other uses for any special burden or sanction, but instead has subjected communicative and non-communicative uses to the same legal restraint. The generality of the prohibition reinforces the conclusion that Congress's interest is not in suppression of free expression, but in combating the dangers flowing from illegal interception.

In related contexts, the Court has recognized that the generality of a law's applicability is a significant factor in evaluating a First Amendment claim. For example, in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), a newspaper obtained information from an anonymous source in return for a promise of confidentiality, but proceeded to publish the source's identity nonetheless. The source—who was connected to a political campaign and who had provided information about his candidate's opponent—sued the newspaper for damages based on the newspaper's failure to honor its promise of confidentiality. This Court held that the First Amendment did not bar a claim by the source for damages under Minnesota's common law doctrine of promissory estoppel. See *id.* at 668-672. The Court rested its decision on the principle that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

Cohen demonstrates that strict scrutiny does not apply to laws of general applicability, even when, in particular cases, they attach liability to the public disclosure of truthful, newsworthy information, such as the identity of the information's source. 501 U.S. at 671-672. As the Court stated in *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961),

"general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests."[8]

Cohen, moreover, exemplifies the broader principle that, for First Amendment purposes, "the comprehensiveness of [a] statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill* v. *Colorado*, 120 S. Ct. at 2497; cf. *Turner*, 512 U.S. at 661 ("broad based" regulations "do not pose the same dangers of suppression and manipulation that [are] posed by * * * more narrowly targeted regulations [aimed at particular speakers]"); *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 424-426 (1993). That reasoning is equally applicable here. The fact that Title III's restrictions are not confined to disclosure, but instead apply with equal force to other uses, confirms that Congress was not animated by hostility toward the dissemination of information generally or a particular category of information. Instead, the legislature was concerned with the "noncommunicative impact," *O'Brien*, 391 U.S. at 382, on privacy of allowing any use (expressive or not) of illegally intercepted communications.

[8] In *Cohen*, the Court held that the general law at issue in that case was not subject to any heightened scrutiny under the First Amendment, notwithstanding the fact that the defendant was a member of the media and the law could have an incidental impact on newsgathering and reporting. 501 U.S. at 668-669. The Court has also recognized, however, that the application of a general law to "conduct with a significant expressive element" may make intermediate scrutiny under *O'Brien* appropriate. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986). While *Cohen* supports the conclusion that strict scrutiny is not appropriate for general laws that could have some incidental impact on speech, Title III's direct application to speech makes it appropriate to apply intermediate scrutiny under *O'Brien*.

Thus, contrary to the court of appeals' view that Title III's broad scope has no bearing on its constitutionality, Pet. App. 21a-22a, Congress's enactment of a comprehensive ban demonstrates that it was acting not for prohibited anti-speech purposes, but for the legitimate end of ensuring the inviolability of vital means of private communication.

3. Finally, the role that Title III's restrictions play in encouraging the uninhibited exchange of ideas and information among private parties argues in favor of intermediate rather than strict scrutiny. "[W]here constitutionally protected interests lie on both sides of the legal equation[,] * * * there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring). Instead, when a law "implicates competing constitutionally protected interests in complex ways," what is called for is a more reflective inquiry that considers the statutory balance struck between the respective interests, rather than "a simple test that effectively presumes unconstitutionality." *Id.* at 912.

Title III "implicates competing constitutionally protected interests in complex ways." As this Court has recognized:

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Harper & Row, Publishers, Inc. v. *Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Ernest Hemingway* v. *Random House*, 244 N.E.2d 250, 255 (N.Y. 1968)). There can be little doubt that the right that Title III creates—the right of those engaged in conversations through private channels

to control whether the conversation remains private or is instead published to the world—serves that "countervailing First Amendment value." *Id.* at 560. Nor can there be any doubt that it promotes the free and uninhibited exchanges in private conversation that would be chilled if every communication were subject to the threat of publication or use by strangers. Intermediate scrutiny provides the means by which to take account of the "constitutionally protected interests * * * on both sides of the legal equation" in this case. *Nixon*, 120 S. Ct. at 911 (Breyer, J., concurring).

C. This Court's Cases Do Not Require The Application Of Strict Scrutiny To Title III

In a line of cases culminating in *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), this Court has applied strict scrutiny to laws restricting publication of truthful information on matters of public significance. See *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Cox Broad. Corp.*, 420 U.S. at 469. Those cases, however, were explicitly decided on their precise facts, which differ in critical respects from this case.

1. In *Florida Star*, this Court considered the constitutionality of a state law that prohibited the mass media from publicly disclosing the identity of rape victims. 491 U.S. at 526 & n.1. In that case, a newspaper obtained a rape victim's identity from the police, who had inadvertently included it in a publicly available report; the newspaper then published the victim's name as part of its coverage of the rape. *Id.* at 526-528. After reviewing *Landmark Communications*, *Cox Broadcasting*, and *Daily Mail*, the Court in *Florida Star* applied what has come to be known as the "*Daily Mail* principle"—that when "'a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of

the highest order.'" 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103).

The *Daily Mail* principle is inapplicable here. Both as originally stated and later explained in *Florida Star*, it extends only to the publication of information that has been "lawfully obtained." 491 U.S. at 534. Indeed, in *Florida Star* itself, the information was not illegally obtained by anyone; the newspaper that published the information acquired it by lawful means, *i.e.*, looking through files the police made publicly available. This Court specifically noted that the case would be different if the information were in private hands and legally protected: "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Ibid.* Because Title III regulates the use of private communications that were *unlawfully* intercepted in violation of Title III, its restrictions fall "outside of the *Daily Mail* principle."

Florida Star also expressly reserved this type of case. The Court specifically noted that "[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8 (emphasis added). The Court's reference to "information [that] has been acquired *unlawfully* by * * * a source" applies to cases—like this one—in which someone other than the person who discloses the information acquired it unlawfully. The significance of the language is also illuminated by the Court's observation in footnote eight that this issue was "raised but not definitively resolved" in the Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam). In that case, the issue of illegal acquisition of information was presented by

the actions of the source, not by the actions of the newspapers that later sought to publish the information.

2. The differences between Title III and the laws at issue in the *Florida Star* line of cases also make apparent the appropriateness of intermediate rather than strict scrutiny. First, neither *Florida Star* nor its predecessors involved a "general regulatory statute[]" that, like Title III, "incidentally limit[s]" expressive activities in particular cases, *Konigsberg*, 366 U.S. at 50. To the contrary, in each of those cases, the statute under review was specifically directed at speech alone. In *Florida Star*, the law prohibited publication of the name of a rape victim "in any instrument of mass communication." 491 U.S. at 526. In *Daily Mail*, the statute barred "publication" of the names of juvenile offenders "in any newspaper." 443 U.S. at 98, 104-105. In *Cox Broadcasting*, the statute and tort at issue made it unlawful to "print and publish, broadcast, televise, or disseminate" by radio the identity of rape victims or otherwise to publicize "private" facts. 420 U.S. at 471 n.1, 487. And in *Landmark Communications*, the law made it unlawful to "divulge[]" papers or information about particular proceedings. 435 U.S. at 831 n.1. This Court squarely held in *Cohen* v. *Cowles Media Co.*, *supra*, that a generally applicable law that does not single out expression is not governed by *Florida Star*, even if the law in a particular case is applied to a media defendant based on its disclosure of truthful information about a matter of public significance. See 501 U.S. at 668-669.

Second, the statutes in *Florida Star* and its predecessors were manifestly content based rather than content neutral. In each case, the statute specifically identified a particular fact to be suppressed or regulated speech pertaining to a particular subject matter. In *Florida Star*, the statute prohibited dissemination of the identity of rape victims, 491 U.S. at 526, and was defended by the State's interest in keeping the identity of such victims a secret, *id.* at 537. The

laws at issue in *Florida Star*'s predecessors were likewise subject and content specific. See *Daily Mail*, 443 U.S. at 98 (statute prohibiting publication of name of juvenile offender to protect identity); *Cox Broad.*, 420 U.S. at 471 n.1, 487 (statute prohibiting publication of name of rape victim, and common-law tort prohibiting disclosure of "private information," both invoked to protect victim's identity); *Landmark Communications*, 435 U.S. at 831 n.1, 835-836 (bar on divulgence of testimony, evidence, and papers in judicial discipline proceedings in order to protect judge's reputation). In contrast to Title III, none of those statutes barred disclosure and all other uses of information, not based on its content, but based on the means by which the information was acquired.[9]

Finally, *Florida Star* turned to some degree on the fact that the information at issue was released by the government itself. Although the Court in *Daily Mail* made clear that its analysis did not depend on whether information

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[9] The law at issue in *Landmark* prohibited the disclosure of testimony and evidence before a judicial misconduct commission. Read literally, the law based its prohibition on the *source* of the information, since it applied to all "papers" filed with the commission (regardless of their substance) and did not prohibit publication of allegations of judicial misconduct made outside the confines of the commission. See 435 U.S. at 830 n.1. But the law in *Landmark* was still not content neutral, since the State singled out a particular type of proceeding by subject matter (judicial misconduct), and its manifest purpose was preventing public knowledge of the anticipated content at such proceedings, *e.g.*, allegations that might injure a "judge's reputation" or damage public "confidence in the judicial system." *Id.* at 833. The state grand jury secrecy law addressed by the Court in *Butterworth* v. *Smith*, 494 U.S. 624 (1990), can be understood as not content neutral for similar reasons, *i.e.*, it was justified by the interest in suppressing speech about the workings of a particular governmental proceeding. See *id.* at 632-634. In addition, *Butterworth* involved a prohibition on disclosure of information acquired by a witness independently of the grand jury, *i.e.*, lawfully obtained. Indeed, it was for that reason that the Court found *Daily Mail* and *Florida Star* controlling. *Id.* at 632.

came from a governmental source, 443 U.S. at 103 (newspaper is entitled to publish information based on usual methods of newsgathering), "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star*, 491 U.S. at 534. In contrast, when information is in private hands—and where (as here) the government has made the initial acquisition of the information a crime—the force of that reasoning is greatly diminished. The Court in *Florida Star* also expressed concern that "timidity and self-censorship" might result if the news media were subject to sanctions for publishing information "released, without qualification, by the government," because the press would then have to "sift[] through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 535-536. That concern has no bearing where, as here, the information was obtained from a private source under circumstances that indicate that the source obtained the information unlawfully, eliminating any "implied representations of the lawfulness of dissemination," *id.* at 536, from the government or anyone else.

In sum, *Florida Star* and its predecessors differ in basic ways from the case now before this Court. Those cases involved laws that singled out speech for different, and disfavored treatment, compared to non-speech uses of the same information; restricted speech on the basis of its content; sought to foreclose public knowledge of specific information altogether; penalized the disclosure of information even when its initial acquisition was lawful; and sanctioned the press for publishing information provided by the government itself or, in many cases, that was related to the activities of the government itself. Because Title III's restrictions differ from those laws in every one of those respects, subjecting its provisions to strict scrutiny under

Florida Star and its predecessors would contravene this Court's direction that conflicts between free speech and privacy values must be resolved on the basis of "limited principles that sweep no more broadly than the appropriate context of the * * * case." 491 U.S. at 533.

II. Title III's Restrictions Satisfy Intermediate Scrutiny

A law that is subject to intermediate scrutiny under the First Amendment must meet three basic requirements. First, it must "further[] an important or substantial governmental interest." *O'Brien*, 391 U.S. at 377. Second, the governmental interest must be "unrelated to the suppression of free expression." *Ibid.* Third, "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Ibid.* Title III's prohibitions meet each of those requirements.

A. The Restriction On Use And Disclosure Furthers Significant Interests Unrelated To The Suppression of Expression

The fundamental purpose of Title III is to ensure that the public may use vital means of private wire, electronic, and oral communication without fear that private communications will be intercepted or used without their permission or consent. See pp. 2-5, *supra*. Title III thus places the force of law behind the security of the nation's widely used channels of private communication, including telephones, cellular phones, faxes, and e-mail. In so doing, Title III supports every person's reasonable expectation of privacy in his personal telephone conversations. See *Katz* v. *United States*, 389 U.S. 347, 352 (1967). See also *Harper & Row*, 471 U.S. at 557-558 (noting the First Amendment right of each individual to determine whether or not he will speak publicly).

The use and disclosure prohibitions serve two essential purposes in Title III's protective scheme. First, by guaranteeing to individuals the right to speak freely without having their private conversations exposed to "the uninvited ear" of strangers, *Katz*, 389 U.S. at 352, Title III encourages exchanges of information and ideas. Relatedly, Title III promotes the development and use of new technological methods of communication, a goal that also serves First Amendment values. Second, Title III's use and disclosure prohibitions reinforce the underlying restriction on illegal interceptions; without that restraint, a person could accede to the temptation to engage in surreptitious surveillance with knowledge that the fruits could be disclosed through or otherwise used by third parties.

1. As this Court has recognized, the injury to privacy that flows from unlawful interceptions does not end with the interception itself. To the contrary, as the Court stated in upholding a grand jury witness's right not to answer questions based on an illegal interception of his communications, the disclosure following the initial intrusion "compounds the statutorily proscribed invasion of * * * privacy." *Gelbard* v. *United States*, 408 U.S. 41, 52 (1972). By prohibiting the use and disclosure of illegally intercepted communications, Title III directly guards against that further intrusion into the integrity of private communications. And, in so doing, it advances the First Amendment value in the choice *not* to speak publicly. See *Harper & Row*, 471 U.S. at 559; *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

Because disclosure and other uses of illegally intercepted communications multiply the injury that results from interception, they also multiply the degree to which such intrusions inhibit the free exchange of thoughts and ideas. If individuals lack assurance that the law will protect the confidentiality of their conversations, their willingness to speak candidly will necessarily suffer. See *United States* v.

Nixon, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests."); *Swidler & Berlin* v. *United States*, 524 U.S. 399, 407 (1998) ("fear of disclosure," even after death, would likely lead to a client's "withholding of information from counsel"); *Jaffee* v. *Redmond*, 518 U.S. 1, 10 (1996) (lack of assurance of confidentiality would impede psychotherapy). Indeed, the profound chilling effect created by the possibility of unauthorized publication has been recognized by the common law from this nation's earliest days. As Justice Story explained in the context of private letters more than 150 years ago, publication of such communications "strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments, between relatives and friends, and correspondents, which is so essential to the well-being of society," by "compel[ing] every one in self defence to write, even to his dearest friends, with the cold and formal severity, with which he would write to his wariest opponents, or most implacable enemies." 2 J. Story, *Commentaries on Equity Jurisprudence* 220-221 (1836 ed., reprinted 1972).[10] Title III's use and disclosure prohibition is thus crucial to ensuring that the threat of technological incursion into private communications does not erode individuals' willingness and ability to exchange frank and candid views.

In 1986, Congress expanded Title III's protection against illegal surveillance to reach electronic communications. Electronic Communications Privacy Act of 1986 (ECPA),

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[10] See also *Denis* v. *LeClerc*, 5 Am. Dec. 712, 716, 1811 WL 986, at *5-*6 (La. Terr. Super. Orleans 1811); F. Lieber, *On Civil Liberty and Self-Government* 109 (1853) (Because "freedom of communion" between individuals is "one of the primary elements of civil liberty," and because nobody "can imagine himself free if his communion with his fellows is * * * submitted to surveillance," all "[f]ree nations" guarantee not merely "the liberty of the press" but "the sacredness of epistolary communion.").

Pub. L. No. 99-508, 100 Stat. 1848. Again, Congress recognized the damage to candid expression that would result from an unimpeded ability to disclose illegally intercepted private communications. Congress noted that the "tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," with the result that private communications and electronically stored private data "may be open to possible wrongful use *and public disclosure* by * * * unauthorized private parties." S. Rep. No. 541, 99th Cong., 2d Sess. 3 (1986) (emphasis added). Cellular telephones exemplify the type of communications technology that would be substantially less attractive to users if interception and dissemination of their calls were lawful. Congress proposed to protect such new forms of computer and telecommunications interchange that "American citizens and American businesses are using * * * in lieu of, or side-by-side with, first class mail and common carrier telephone services." *Id.* at 5.[11]

[11] As Congress noted in expanding the scope of Title III in 1986, the absence of legal protection against surreptitious interceptions would "discourage potential customers from using innovative communications systems" and "businesses from developing new [and] innovative forms of telecommunications and computer technology." S. Rep. No. 541, *supra*, at 5. See *Electronic Communications Privacy Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 44 (1985 & 1986) (*ECPA Hearings*) (testimony of Fred W. Weingarten, Program Manager, Communication and Technologies Program, Office of Technology Assessment) ("There are two dangers in leaving this type of new application unprotected. One danger, of course, is a gradual erosion of privacy, a loss of the right to whisper and to keep our dealings confidential. The other danger is that we may be denied useful applications and useful new technologies because they're unprotected. Consumers and users simply will not use these services if they are not properly protected, and they will not be developed and offered in the marketplace."). See also *id.* at 4, 38-39, 70, 93, 155 (similar testimony).

Title III thus advances a significant purpose in protecting the modern equivalents of letters, such as phone calls, e-mails, and faxes. And because electronic intrusions into modern communications—unlike intrusions into letters—can be accomplished without the physical access that ordinarily permits prevention and detection, the need for legal protection against unauthorized disclosure in this context is even greater. Attesting to the importance of that interest, more than three dozen States and the District of Columbia have enacted legislation proscribing the unauthorized use and disclosure of illegally intercepted communications. See *Boehner* v. *McDermott*, 191 F.3d 463, 468 n.6 (D.C. Cir. 1999), petition for cert. pending, No. 99-1709.

2. Prohibiting the use and disclosure of illegally intercepted communications also reinforces the underlying prohibition on illegal surveillance itself. In particular, by barring the knowing use and disclosure of illegally intercepted communications, Title III's prohibitions reduce demand for such communications and deprive potential wiretappers of the fruits of their labors. *Boehner*, 191 F.3d at 469-470; see *Fultz* v. *Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991).

The need to prohibit such uses is particularly important because illegal interception is by nature a clandestine enterprise. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967) ("Detection of surveillance devices is difficult."); 1968 Senate Report 69 (because of surreptitious nature of activity, fact or source of such an invasion "[a]ll too often * * * will go unknown"); *id.* at 96 ("[U]nlawful electronic surveillance is typically a clandestine crime."); *ECPA Hearings* 54-55 (noting the increasing difficulty of detecting surveillance).[12] If untrammeled disclosure by non-

[12] Indeed, "[t]he last 20 years have seen an extraordinary explosion in technologies for invading people's privacy." *Protection from Personal*

participants were lawful, illegally intercepted communications could be easily "laundered" to prevent discovery of the interceptor. See *Boehner*, 191 F.3d at 471 (invalidation of use or disclosure prohibition would effectively "render[] the government powerless to prevent disclosure of private information, because criminals"—who may bug residences, intercept phone calls, or engage in other forms of unlawful electronic surveillance—"can literally launder illegally intercepted information") (internal quotation marks omitted). All an individual has to do is covertly carry on an interception—an activity that can be conducted from the privacy of the home —and anonymously provide a tape of it to a person known to have an interest in disclosing it. If the ban on illegal interceptions could be evaded that easily, there would be a large incentive to carry out illegal interceptions in order to make use of them through third parties.

3. The court of appeals did not dispute the legitimacy of the above interests. But it declared the first interest (in privacy and promoting free expression) to be non-cognizable

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Intrusion Act and Privacy Protection Act of 1998: Hearing Before the House Comm. on the Judiciary, 105th Cong., 2d Sess. 75 (1998) (statement of Professor Lawrence Lessig, Harvard Law School). For example, an FBI publication reports that "[l]ittle or no technical expertise is needed to convert a readily available computer equipped with sound capability, a modem, and the appropriate software into a device that will allow the surreptitious interception of any audio generated within its proximity." C. W. O'Neal, *Surreptitious Audio Surveillance: The Unknown Danger to Law Enforcement*, FBI Law Enforcement Bulletin, June 1998, at 10, 11. Even conversations held behind closed doors may not be safe from intrusion. According to some, eavesdroppers can listen through closed windows using a laser listening device. When the laser beam is pointed at a window, the device detects the window's vibration and thus conversations going on inside; the device can work from as far as a quarter-mile away. See T. Larsen, *The Layman's Guide to Electronic Eavesdropping* 55-56 (1996). See also http://www.espionage-store.com/surveillance.html (describing device); http://www.pimall.com/nais/n.lazer.eaves.html (similar).

under intermediate scrutiny, and the latter (deterrence) too conjectural to sustain the statute. Both of those conclusions are incorrect.

a. The court of appeals rejected the government's interest in preserving privacy and the right *not* to speak publicly as "content-based" and therefore not cognizable for purposes of intermediate scrutiny. Pet. App. 26a-27a. In so concluding, the court of appeals erroneously assumed that Title III's restrictions are designed to protect individuals from the harms associated with the disclosure of "intimate facts concerning one's life." *Id.* at 26a. But the spectrum of communications that Title III covers is unlimited in subject matter or nature; it encompasses business, social, personal, and familial interchange, and protects serious debate as well as idle conversation. Title III's restrictions thus do not seek to protect against the injury that occurs when particularly personal facts, or identified pieces of information, are disclosed. Instead, Title III protects against the magnified harm that results when any illegally intercepted conversation is disseminated to a wider audience. Just as having additional eavesdroppers rather than a single eavesdropper listening in on a conversation multiplies the intrusion into privacy regardless of content, so too multiplying the number of individuals to whom the conversation is disclosed after the fact increases the harm, whether or not intimate facts are involved. The interests in preventing that increased injury and in reassuring individuals that they can communicate freely and candidly in private are independent of the content of any communications that could be disclosed absent the prohibition.

It is plain that this interest is directly advanced by Title III's prohibition on disclosure and other uses of illegally intercepted information. Title III does not impose restrictions on some speakers while leaving others who have the same knowledge from the illegal source free to disseminate

the communication. Such selectivity in speakers undermined the degree to which the laws involved in *Florida Star* and *Daily Mail* advanced their stated purposes. But Title III does not single out media of mass communication, *Florida Star*, 491 U.S. at 526 n.1, 540, or newspapers, *Smith* v. *Daily Mail*, 443 U.S. at 98, 104; it applies evenhandedly to all speakers. Congress thereby crafted a law that does all it can reasonably do to advance its underlying purpose of protecting the privacy of wire, oral, and electronic communications.

b. The court of appeals likewise erred in dismissing the deterrent function of the Title III prohibition. See Pet. App. 32a-34a. In particular, the court expressed skepticism that reducing the opportunities to disclose illegally intercepted communications would reduce the frequency of unlawful interceptions, dismissing the link between them as "*ipse dixit*" that rests on "nothing more than assertion and conjecture." *Id.* at 33a-34a. But that very logic has long been accepted as a justification for statutes that prohibit the knowing receipt and sale of stolen property. See, *e.g.*, *United States* v. *Gardner*, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861 (1975); *United States* v. *Bolin*, 423 F.2d 834, 838 (9th Cir.), cert. denied, 398 U.S. 954 (1970). By denying the thief an outlet for distribution of the stolen goods, the law deters the underlying act of theft. See 2 W. R. LaFave & A. W. Scott, Jr., *Substantive Criminal Law* § 8.10(a), at 422 (1986) ("Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms."). This Court relied on a similar rationale in *New York* v. *Ferber*, 458 U.S. 747, 759-760 (1982), when it held that "[t]he most expeditious if not the only practical method" of effectuating a ban on the production of child pornography "may be to dry up the market for this material" by imposing sanctions on advertising and distribution. And the Court relied on the same rationale again to sustain a

prohibition on the possession of child pornography in *Osborne* v. *Ohio*, 495 U.S. 103, 109-110 (1990), finding it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[13]

The court of appeals suggested that the government was obligated to "prove" the deterrent effect of the use restrictions on illegal surveillance. Pet. App. 34a. In light of the history of statutory prohibitions on fencing stolen property, and the holdings of cases such as *Ferber*, no such evidentiary showing is required. The well-recognized connection between the existence of outlets for illegally acquired goods and the incentive to engage in the illegal acquisition of those goods provides proof enough of the proposition that more surveillance will take place if eavesdroppers enjoy unrestricted demand for the fruits of their illegal labors. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. at 906 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Insistence on rigid empirical proof of a deterrent connection in this context could prevent Congress from

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[13] Respondents attempt to distinguish the market for stolen communications from the markets for stolen goods and child pornography by pointing out that "money drives the market" for the latter products whereas, in this case, no one appears to have paid the interceptor for the taped conversation. Vopper Br. in Opp. 12 n.7. That does not mean that the interception in this case had no economic motive; the individual who intercepted the phone conversation and passed it to Jack Yocum was likely motivated by a desire to embarrass the union and thwart its bargaining demands. In any event, whatever motivates an illegal interception—and motives range from acquiring embarrassing information about a neighbor to achieving political ends—the incentive to do so will be sharply diminished if there is a legal impediment to use or disclosure of the information.

regulating at all. "[A]s a practical matter it is never easy to prove a negative [and] it is hardly likely that conclusive factual data could ever be assembled." *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) (discussing exclusionary rule).[14]

B. The Restrictions On Use And Disclosure Do Not Unnecessarily Restrict Expressive Activities

The burden that Title III's restrictions place on expressive activity is "no greater than is essential to the furtherance of th[e] interest[s]," *O'Brien*, 391 U.S. at 377, underlying Title III. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner*, 512 U.S. at 662. Instead, "the requirement of narrow tailoring is satisfied so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ibid.* (internal quotation marks omitted). A regulation is considered to be narrowly tailored, for these purposes, as long as "the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Ibid.* (internal quotation marks omitted).

1. The government's legitimate interest in preserving the confidential nature of all private wire, oral, and

[14] Even if one were to assume that empirical evidence were required, however, the government was not given the opportunity to meet that burden, as it is entitled to do under 28 U.S.C. 2403. When the constitutionality of an Act of Congress is called into question in private litigation, federal courts are required by law to give the United States an opportunity for "presentation of evidence" on the constitutional issue. 28 U.S.C. 2403(a). In this case, however, the Attorney General did not receive notice of respondents' constitutional challenge to Title III until after the oral argument in the court of appeals, see p. 8, *supra*, and the court of appeals indicated that it found the government's position to be "unsupported" for the first time in its opinion. Pet. App. 34a.

electronic communications, regardless of their subject matter, would be less effectively met, if met at all, in the absence of Title III's comprehensive use and disclosure prohibition. Persons engaged in telephone conversations reasonably expect and wish their communications to remain confidential. *Katz*, 389 U.S. at 352. That reasonable expectation of privacy would be severely jeopardized by the multiplication of the intrusion accomplished by disclosure and other uses. While the knowledge (or suspicion) that a conversation could be illegally intercepted would deter private communications, it is far more chilling of speech for a person to know that his private expressions may later be reported with impunity to the world at large.

It would not be reasonable to require the government to confine the protections of Section 2511(1)(c) and (d) to disclosure or other uses of "sensitive" or "private" information. See Vopper Br. in Opp. 12 n.7. Such a rule in itself would create a content-based distinction. Moreover, it would be ineffective to reassure speakers that conversations of any sort would remain confidential, as intended. That uncertainty would dampen the development and use of new technological media for communication. And if only some private speech were protected, speakers would be unsure, at the time of a communication, what subjects would be covered as sufficiently sensitive or private, thus chilling communication as whole. As a result, the interests underlying Title III "would be achieved less effectively absent the regulation," *Turner*, 512 U.S. at 662.

2. Congress's interests could not be as effectively achieved by relying exclusively on Title III's underlying prohibition on unauthorized electronic surveillance (18 U.S.C. 2511(1)(a)). As noted above, the use of intercepted communications causes additional harm to privacy interests beyond that created by interception alone. See *Gelbard*, 408 U.S. at 52 (disclosure "compounds the statutorily proscribed

invasion of * * * privacy"). Without Title III's prohibition on use and disclosure, the government would be powerless to counteract the chilling effect that exploitation of unlawfully intercepted communications has on the public's confidence in the security of private means of communication.

Deterrence of illegal interceptions would also be markedly less effective if Title III's prohibition reached only the ban on interceptions. Electronic surveillance is, by its very nature, a surreptitious enterprise, and if illegally intercepted communications could be "laundered" through non-participants, the illegal wiretapper could often achieve his goals while escaping punishment. *Boehner*, 191 F.3d at 471. Indeed, this case graphically illustrates the fact that a person who illegally intercepts a conversation and wishes to make it public can do so, without any risk to himself, by turning it over anonymously to third parties who have an interest in disclosing its contents. Given the ease with which the identity of the intercepting party can be concealed, Title III would lose much of its force if the only means of preventing invasions into the sanctity of private communications were prosecution of the illegal interceptor himself.

Finally, as noted above, Title III's prohibitions extend no further than necessary to achieve its goals. Title III does not impose any restriction on the use or disclosure of information obtained by means other than illegal surveillance. And Title III was not intended to prohibit anyone from disseminating that which is already common knowledge. See 1968 Senate Report 93 ("[t]he disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited" by Section 2511(1)(c) and (d)). Title III is thus crafted to take account of the fact that the interests underlying its prohibition "fade once information already appears on the public record." *Florida Star*, 491 U.S. at 532 n.7. In sum, Title III's restrictions on the use

and disclosure of illegally intercepted communications are an appropriately tailored means of protecting privacy and speech interests without impinging unnecessarily on the free flow of information and ideas.

C. Title III's Restrictions On Use And Disclosure Do Not Impermissibly Chill Protected Speech

The court of appeals expressed concern that the threat of liability under Title III for the use or disclosure of illegally intercepted communications would deter the news media from disseminating information that is *not* the product of illegal electronic surveillance. Pet. App. 36a. In particular, the court of appeals expressed concern that "[r]eporters often will not know the precise origins of information they receive from witnesses and other sources." *Ibid.*

That concern is unfounded. If reporters in fact do not know the origins of their information, they cannot be held liable under Title III; the prohibitions in Section 2511(1)(c) and (d) are violated only when a defendant "know[s] or ha[s] reason to know" that the communication was intercepted in violation of Title III. That scienter requirement is demanding. Because the "reason to know" standard—unlike the phrase "should know"—"implies no duty" to investigate or to discover additional facts, Restatement (Second) of Torts § 12 cmt. a (1965), there can be no liability for simple failure to *discover* the unlawful origins of a communication, no matter how negligent. See *Novicki* v. *Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991) (reason-to-know standard "imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him"). Instead, liability may attach only if the defendant has *actual* "knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either *infer*" that the fact in question exists "or would regard its existence *as so highly probable that his conduct would be predicated upon the assumption that the fact did*

exist." Restatement (Second) of Torts § 12 cmt. a (emphasis added). That means that, unless a person actually possesses information from which he or a reasonable person would infer that the communication was unlawfully intercepted, liability cannot attach.

That scienter requirement dispels any legitimate concern regarding the chilling effect of the challenged provisions. To the extent any residual concerns remain, moreover, those concerns could be addressed by procedural measures that stop short of invalidating the provisions themselves. See Pet. App. 56a-57a (Pollak, D.J., dissenting). For example, when a claim is brought under Title III based on the disclosure of information about matters of public significance by persons who were not involved in the illegal interception, Title III's "reason to know" standard could be supplemented by requiring proof that the defendant acted with reckless disregard of facts indicating the information's illegal origins. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (adopting "actual malice" standard in certain defamation cases). A court could also consider employment of an elevated standard of proof of scienter in civil cases, such as proof by "clear and convincing" evidence. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (requiring clear and convincing evidence of actual malice in certain defamation cases). Finally, appellate courts might be warranted in conducting independent review of the findings of the trier of fact. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984) (*de novo* appellate review of findings regarding actual malice). See generally *Waters* v. *Churchill*, 511 U.S. 661, 669-671 (1994) (plurality opinion) (discussing circumstances in which First Amendment requires modifications of burdens of proof and other procedural rules). To the extent that enforcement of the standards of Title III leaves any question that the press may act with excessive caution, such procedural measures,

individually or collectively, would be more than adequate to ensure that Title III does not deter the dissemination of information from sources other than illegal electronic surveillance. Such an approach would far better reconcile the privacy and expression interests in this case than a holding that invalidates Congress's effort to provide comprehensive legal protection against the unauthorized dissemination of information acquired through illegal interceptions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 18 U.S.C. 2510 provides in pertinent part:

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

* * *

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

* * *

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

* * *

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include–

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device; or

(C) any communication from a tracking device (as defined in section 3117 of this title);

3. 18 U.S.C. 2511 provides in pertinent part:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 U.S.C. 2510-2520] any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to

intercept, any wire, oral, or electronic communication; [or]

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

* * *

* * *

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the

essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then—

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

4. 18 U.S.C. 2512 provides:

§ 2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious

interception of wire, oral, or electronic communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined under this title or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof,

to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(3) It shall not be unlawful under this section to advertise for sale a device described in subsection (1) of this section if the advertisement is mailed, sent, or carried in interstate or foreign commerce solely to a domestic provider of wire or electronic communication service or to an agency of the United States, a State, or a political subdivision thereof which is duly authorized to use such device.

5. 18 U.S.C. 2515 provides:

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

6. 18 U.S.C. 2520 provides:

§ 2520. Recovery of civil damages authorized

(a) IN GENERAL.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) COMPUTATION OF DAMAGES.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

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IN THE

Supreme Court of the United States

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Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure or other use of an unlawfully intercepted electronic communication by a person who was not involved in the interception itself, but who knows or has reason to know that the communication was unlawfully intercepted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., were plaintiffs in the District Court and appellees in the Court of Appeals. Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; Lackazerne, Inc., d/b/a WGBI Radio; and Jack Yocum were defendants in the District Court and appellants in the Court of Appeals. The complaint also named as defendants a Jane Doe and John Doe, who were named as appellants in the Court of Appeals. Petitioner United States of America appeared as an intervenor of right in the Court of Appeals pursuant to 28 U.S.C. § 2403(a).

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IN THE

Supreme Court of the United States

Nos. 99-1687, 99-1728

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS GLORIA BARTNICKI AND ANTHONY F. KANE, JR.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 200 F.3d 109 (3d Cir. 1999), and is reprinted in the appendix to the Petition for Certiorari in No. 99-1728 ("Pet. App.") at 1a-58a. The opinion of the United States

District Court for the Middle District of Pennsylvania denying respondents' motions for summary judgment is unreported and is reprinted at Pet. App. 59a-68a. The opinion of the District Court denying reconsideration of that ruling is unreported and is reprinted at Pet. App. 70a-74a.

JURISDICTION

The Court of Appeals entered judgment on December 27, 1999. Timely petitions for rehearing and suggestions of rehearing *en banc* were denied on February 25, 2000. Pet. App. 82a-83a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 *et seq.*, provides in pertinent part as follows:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who –

* * * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[,]

* * * *

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Other relevant provisions of Title III are reproduced at Pet. App. 86a-91a.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 *et seq.*, provides in pertinent part as follows:

§ 5703. Interception, disclosure or use of wire, electronic or oral communications

Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:

* * * *

(2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

* * * *

§ 5725. Civil action for unlawful interception, disclosure or use of wire, electronic or oral communication

(a) Cause of action.—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication ....

STATEMENT OF THE CASE

A. Factual Background

Petitioner Gloria Bartnicki was employed by the Pennsylvania State Education Association ("PSEA") to provide services and assistance to PSEA affiliates representing personnel employed by various public school districts. One of those affiliates, representing teachers employed by the Wyoming Valley West School District, was in contract negotiations during 1992-94, and Bartnicki was the chief negotiator for the Wyoming Valley teachers' union. Pet. App. 2a. Petitioner Anthony Kane, a teacher at Wyoming Valley West High School, was president of the union. *Id.*

In May of 1993, Bartnicki and Kane had a telephone conversation concerning the negotiations. Kane was speaking on a conventional telephone at home; Bartnicki was in her car using a cellular phone. Pet. App. 3a. In their conversation, the two union representatives discussed strategy relating to the labor dispute, including the timing of a possible strike date. Joint Appendix ("JA") 41, 45. They expressed their candid assessments of School District representatives, noting that they "fe[lt] sorry" for one but viewed others as "nitwits," identifying one as "too nice a guy" and others a "rabble rousers." JA 45-48. Bartnicki and Kane evinced their exasperation with the fact that the School Board had been "negotiating in the paper" by telling reporters that the Board would not agree to more than a three percent pay increase for the teachers. JA 46, 47. In condemning the Board's posture, Kane stated hyperbolically: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . [t]o blow off their front porches, we'll have to do some work on some of those guys." JA 46. Kane was speaking rhetorically, using a figure of speech; he was not making any actual threat. JA 55-56, 90, 95-96, 103-105, 133-134.

The conversation was intercepted and recorded onto a cassette tape by an unknown person, apparently using a scanner that picked up the signal from Bartnicki's cellular handset. The tape then was placed by an unknown person in the mailbox of respondent Jack Yocum, the president of the Wyoming Valley West Taxpayers' Association, an organization opposed to the teacher union's bargaining proposals. Pet. App. 2a-4a.

After listening to the tape and recognizing the voices of Bartnicki and Kane, Yocum gave a copy of the tape to respondent Frederick Vopper, who, under the name of Fred Williams, hosts a talk show carried by radio stations WILK and WGBI, which are operated by respondents Keymarket of NEPA, Inc., and Lackazerne, Inc., respectively. Pet. App. 3a-4a. Although Vopper received the tape in the Spring of 1993, he did not play it until September 30 of that year. JA 72, 76. (In the meantime, neither Kane nor any other union representative had blown up porches or engaged in any other conduct of such a nature.)

Until that broadcast, Bartnicki and Kane did not know that their conversation had been intercepted and taped. JA 131-132. It is undisputed that they intended for their conversation to remain private. The tape shows that Kane characterized the conversation as "very confidential." JA 43. Indeed, in the taped conversation, Bartnicki gave Kane both her home telephone number and her cellular carphone number. JA 42-43. Bartnicki testified that Vopper initially broadcast even the part of the tape that revealed her phone numbers, and that she immediately be-

gan "to get terrible calls after that," so that she had to change the numbers.[1] JA 106-107.

Both Yocum and Vopper realized that the conversation between Bartnicki and Kane had involved a cellular telephone, and that a scanner probably had been used to intercept the call. JA 73-75, 115. Nevertheless, Vopper played the tape in its entirety over the air on at least two occasions, JA 20, 39, and he subsequently played selected portions of the tape on numerous additional occasions. JA 64; Pet. App. 4a.[2]

B. The Federal and State Statutory Schemes

Both the United States Congress and the Pennsylvania legislature have enacted statutes that prohibit the conduct in which Yocum, Vopper, and the respondent radio stations engaged.

In 1968, Congress found that "[t]he tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized." S. Rep. No. 90-1097, 90th Cong., 2d Sess. 67 (1968).

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[1] Apparently the tape subsequently was warped so that the numbers would be indistinguishable. JA 42-43, 106.

[2] Some other members of the media had received copies of the tape before Vopper played it, but none of them played it until Vopper had done so. For example, the Wilkes-Barre Times Leader newspaper "had the tape from the spring of 93 and . . . they were not going to use it and . . . the only reason they did is because Fred [Vopper] revealed it." JA 100.

There is evidence that the journalistic practices of Vopper and WILK are far from the norm of responsible radio broadcasters. The Luzerne County District Attorney testified that WILK is so irresponsible that WILK is the only radio station to which the District Attorney's office refuses to send its press releases. JA 124-125.

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage. [*Id.*]

In 1986, Congress found that the development of cellular telephones, computers, and other new means of electronic communication had made the problem even worse. "[T]remendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," increasing the risk that communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, 99th Cong., 2d Sess. 3 (1986).

Congress' response to these problems was to adopt a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard v. United States*, 408 U.S. 41, 46 (1972), expressing a "fundamental policy adopted by Congress," *id.* at 47. That statutory scheme is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 311, as amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. § 2510 *et seq.*

Consonant with the findings made by Congress, Title III broadly prohibits both the interception of electronic communications and the subsequent use of intercepted communications. With certain enumerated exceptions for specified law enforcement activities, the statute makes it unlawful "to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). ("Interception" is defined as "the

aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).) And the statute contains three provisions which, together, prohibit comprehensively the subsequent use of unlawfully intercepted communications.

First, the statute prohibits in broad terms "us[ing], or endeavor[ing] to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. § 2511(1)(d). To make clear that *disclosure* is included among the prohibited uses of such communications, the statute specifically prohibits "intentionally disclos[ing], or endeavor[ing] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through [unlawful] interception." 18 U.S.C. § 2511(1)(c). And a third provision makes clear that the prohibition of the use of unlawfully intercepted communications applies not only to private dealings, but to every kind of government proceeding as well – federal, state, and local. 18 U.S.C. § 2515.

In addition to criminal penalties, *see* 18 U.S.C. § 2511(4), Title III provides for a civil action by "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [the Act]." 18 U.S.C. § 2520(a). In such a suit the plaintiff may obtain equitable or declaratory relief, damages (calculated as the greater of actual damages or specified statutory damages), "punitive damages in appropriate cases," and attorney's fees and costs. 18 U.S.C. § 2520(b), (c).

Pennsylvania – together with some forty other States (*see* the Addendum to this brief) – has enacted a Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 *et seq.*, which contains provisions very similar to the relevant portions of Title III. In addition to prohibiting interception, the Pennsylvania statute prohibits "intentionally us[ing] or endeavor[ing] to use the contents of any wire, electronic or oral communication . . ., knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication," *id.* § 5703(3), and "intentionally disclos[ing] or endeavor[ing] to disclose" the contents of such a communication, *id.* § 5703(2). A civil action is made available to "[a]ny person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter." *Id.* § 5725(a). The remedies available under the state statute are "actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher," punitive damages, attorney's fees and costs. *Id.*

C. Proceedings Below

Bartnicki and Kane sued Yocum, Vopper, WILK and WGBI under both the federal and statue statutes, for having used and disclosed the tape of their intercepted telephone conversation. The complaint sought actual damages, statutory or liquidated damages, punitive damages, fees and costs. JA 28, 30. Petitioners subsequently withdrew their prayer for actual damages, without, however, conceding that they had not suffered such damages. JA 59, 130. Cross-motions for summary judgment were denied by the District Court, Pet. App. 59a-69a, and that court denied respondents' motion for reconsideration, Pet. App. 70a-74a.

The District Court then certified two questions for appeal pursuant to 28 U.S.C. § 1292(b): "whether the imposition of liability on the media Defendants under [Title III and the Pennsylvania statute] solely for broadcasting the newsworthy tape . . ., when the tape was illegally intercepted and recorded by unknown persons who were not agents of Defendants, violates

the First Amendment; and (2) whether imposition of liability under the aforesaid . . . Statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media defendants violates the First Amendment." Pet. App. 76a. Respondents Vopper, WILK and WGBI petitioned for permission to appeal, JA 62-65, and respondent Yocum filed an answer to the petition in which he joined the media defendants' request, JA 66. The Court of Appeals granted the petition for permission to appeal.

After the case had been briefed and argued, the Clerk of the Court of Appeals sent a letter to the United States Attorney, Pet. App. 77a-79a, providing notice pursuant to 28 U.S.C. § 2403(a), which grants the United States the right to intervene in any action "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question." The United States accepted that invitation and filed a brief "to defend the constitutionality of Title III . . . as applied in this case." Brief for the United States in *Bartnicki, et al. v. Vopper, et al.*, No. 98-7156, at 1 (3d Cir.). PSEA was granted leave to file a brief *amicus curiae*, in which it defended the constitutionality of the state and federal statutes as applied to the conduct at issue in this case.

By a 2-1 vote, the Third Circuit reversed the District Court's order denying summary judgment to the defendants. The Court of Appeals announced its holding as follows: "We . . . hold that the [state and federal] Wiretapping Acts fail the test of intermediate scrutiny [under the First Amendment] and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." Pet. App. 42a.

In reaching that conclusion, the court "focus[ed] on the United States'. . . contention . . . that the provisions [of Title III prohibiting the disclosure or other use of intercepted communi-

cations] promote privacy by eliminating the demand for intercepted materials on the part of third parties." Pet. App. 33a. The Court of Appeals was "satisfied that this . . . justification does not rely on the communicative impact of speech and, therefore, that the Acts are properly treated as content-neutral." Pet. App. 28a. The court therefore "adopt[ed] the government's position that we should apply intermediate scrutiny [rather than strict scrutiny] in our analysis of the issue before us." *Id.* The Third Circuit held nonetheless that the challenged provisions cannot withstand such scrutiny.

Stating that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best," Pet. App. 33a, and noting that no evidence had been offered on the point, the Third Circuit majority was "not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect." Pet. App. 34a. The court further declared that "the government's desired effect can be reached" by punishing those who "participated in the interception," making it unnecessary, in the Third Circuit's view, to allow recourse against third parties who disclose or otherwise use communications that they know, or have reason to know, were illegally intercepted by others. Pet. App. 35a. And the majority was "also concerned," Pet. App. 36a, that the statute might deter the media "from publishing even material that may lawfully be disclosed under the Wiretapping Acts," *id.*, because a reporter might be uncertain as to how the content of a communication was obtained.

The Third Circuit recognized that, separate and apart from whatever effect a prohibition of disclosure and other uses of intercepted communications may have in deterring interception in the first place, such a prohibition serves the government's "significant interest" in protecting privacy interests from *the harm caused directly by disclosure*, which "compound[s]" the "invasion of privacy" that is initiated by the unlawful interception of a communication. Pet. App.26a (quoting *Providence Journal*

Co. v. FBI, 602 F.2d 1010, 1013 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980)). But the majority declined to consider this justification for the challenged statutory provisions, other than to express the concern that, under such a rationale, the statutes' prohibition of disclosure might be "subject to strict scrutiny as a content-based regulation." Pet. App. 27a.

Judge Pollak, sitting by designation, dissented. He disagreed with the majority's view that "[t]he connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." Pet. App. 50a ((Pollak, J., dissenting) (quoting Pet. App. 33a) (majority opinion)). And Judge Pollak sharply took issue with the majority's refusal to consider the compounding of injury that is caused by deliberate disclosure of an intercepted communication. As Judge Pollak saw it, "unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat." Pet. App. 54a.

Petitioners Bartnicki and Kane moved for rehearing and suggested rehearing *en banc*, as did the United States. The petitions were denied, with the suggestion of rehearing *en banc* being rejected by a vote of 6 to 5. Pet. App. 82a-83a.

SUMMARY OF ARGUMENT

The question reserved in prior decisions of this Court as to whether the media or their sources might have a First Amendment privilege to disclose certain kinds of confidential information wrongfully obtained from private parties is presented here in a very narrow context.

Respondents have not been sued because of any facts or views they expressed, but because they broadcast the tape of an unlawfully intercepted private conversation. Furthermore, as the case comes to this Court, it must be assumed that respondents knew or had reason to know that the conversation had

been unlawfully intercepted. And no question is presented here as to the particular forms of damages that might be appropriate or permissible; nor does this case involve any question of prior restraint. The sole question presented is whether the First Amendment invalidates the wiretapping laws of the United States, Pennsylvania and some forty other States to the extent that those statutes make it unlawful for a person to distribute or broadcast a recording of a private conversation that the defendant knew or had reason to know was unlawfully intercepted.

I.

The challenged provisions are subject to intermediate First Amendment scrutiny, not strict scrutiny, for two reasons.

First, the statutes do not single out speech for any special prohibition; they prohibit any kind of use of an unlawfully intercepted communication. The case therefore is "controlled by . . . the . . . well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

Second, even considered in themselves, the anti-disclosure provisions are content-neutral. They do not "distinguish[ ]favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 643 (1994). Rather, the proscriptions apply entirely irrespective of the subject of an intercepted communication or the viewpoint, if any, expressed in it; and they apply irrespective of the views or ideas, if any, expressed by the person who makes the unlawful disclosure. The challenged provisions thus do not " 'lend[ ] [themselves]' to being 'used for invidious thought-control purposes,' " *Hill v. Colorado*,120 S. Ct. 2480, 2493 (2000) (quoting *id.* at 2504 (Scalia, J., dissenting)). These statutes easily satisfy "[t]he principal inquiry in determining content neutrality," *Hill*, 120 S. Ct. at 2491, because this is not a case in

which "the government has adopted a regulation of speech because of disagreement with the message it conveys," *id.*

In previous cases where this Court has reviewed laws that prohibit disclosure of material not because of the subjects or views expressed, but because of the manner in which the material was obtained, the Court has applied, at most, intermediate scrutiny. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). On the other hand, the form of strict scrutiny the Court has applied in cases such as *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), and *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)—under which "a need to further a state interest of the highest order" must be shown before the government may punish a newspaper's publication of "truthful information" the newspaper "lawfully obtain[ed] . . . about a matter of public significance"—was developed by the Court as the appropriate mode of analyzing statutes that discriminated both on the basis of *content* (by prohibiting speech only on particular subjects) and on the basis of the *speaker* (by allowing information on the specified subjects to be disclosed by anyone other than the mass media or some segment thereof).

It is fully consistent with *Daily Mail* and *Florida Star* to recognize that, where a statute is content-neutral and speaker-neutral, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Florida Star*, 491 U.S. at 534.

II.

The content-neutral and speaker-neutral statutes at issue here must, as applied, be "sustained if '[they] further[ ] an important or substantial governmental interest; if the governmental interest

is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting*, 512 U.S. at 662. That test is clearly satisfied.

As Congress found, interception of electronic communications is a serious national problem. More than ten million scanners—devices to intercept cellular telephone calls—are in use in this country, and interception of computer-generated communications also is well-known. The federal government and the States have a legitimate—indeed, a compelling—interest in protecting from such electronic surveillance the "expectation of . . . the confidentiality of . . . conversations . . . [,] to which we accord deference for the privacy of all citizens." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

In acting to protect in this context the "right to be let alone," *Hill v. Colorado*, 120 S. Ct. at 2489 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), the legislatures have promoted the "freedom *not* to speak publicly," which "serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row*, 471 U.S. at 559. As Congress recognized, without statutory protection for the privacy and security of electronic communications, individuals would be chilled from making free and full use of these important channels of communication.

To advance these substantial governmental objectives, it was necessary to prohibit not only the act of interception, but also the disclosure or other use of unlawfully intercepted communications by persons who know or have reason to know that a communication was unlawfully intercepted.

This was necessary, first, for the simple reason that "the invasion of privacy is [not] over and done with" when an interception occurs, but is "compound[ed]" by disclosure. *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). Whether the disclo-

sure is by the interceptor himself or by one through whom the intercepted communication has, in effect, been "laundered," the injury is the same. And the legislatures' speech-enhancing goal of increasing confidence in the security of electronic communications hardly could be attained by a statutory regime under which interceptors might (in the rare instances where they can be identified) be punished but the confidential communications they steal could be disclosed with impunity by third parties.

In addition, it was "surely reasonable," *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), for the legislatures to act on the principle that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market." *New York v. Ferber*, 458 U.S. 747, 760 (1982). By "drying up the market" for unlawfully intercepted communications, the prohibitions of disclosure and other uses reduce the incentives to intercept electronic communications in the first place.

In this case, as in *Seattle Times, Harper & Row, Zacchini* and *Cohen*, the right of the media to gather and report news does not create a privilege to violate laws applicable to all citizens which protect legitimate interests in the confidentiality of communication and expression. The First Amendment does not make "private wiretapping" a legitimate source of news. *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972). To provide a cause of action to one injured by the broadcast of an unlawfully intercepted communication, where the broadcaster and his source knew or had reason to know that the communication was unlawfully intercepted, serves to promote, rather than to infringe, First Amendment values properly understood.

ARGUMENT

THE CHALLENGED PROVISIONS ARE CONTENT-NEUTRAL AND NECESSARY TO FURTHER THE IMPORTANT GOVERNMENTAL INTERESTS OF PROTECTING INDIVIDUALS FROM INTRUSION AND FOSTERING THE SECURITY THAT IS REQUIRED IF ELECTRONIC COMMUNICATION IS NOT TO BE CHILLED. THOSE PROVISIONS, AS APPLIED HERE, THEREFORE SATISFY THE FIRST AMENDMENT.

INTRODUCTION

At the outset, it is important to recognize that the question presented in this case is a narrow one.

1. Respondents challenged the statutes only as applied to their specific conduct—respondent Yocum's transmittal to the media respondents of a tape containing a recording of the entire intercepted conversation between petitioners Bartnicki and Kane, and the media respondents' broadcasts of that tape. Thus, no question is presented here as to whether, in the face of these statutes, the First Amendment would have protected respondents had they disclosed particular facts they learned from the tape without making public the actual verbatim recording of the unlawfully intercepted communication. *Cf. Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (noting that the Copyright Act restricts publication of particular expression, but not of the facts or ideas expressed); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569, 577 n.13 (1977) (noting distinction between broadcasting a tape of a performer's entire act and merely describing the act); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511-512 (1991) (noting that the use of a direct quotation may be injurious "regardless of the truth or falsity of the factual matters asserted within the quoted statement, . . . because the manner of expression or even the fact

that the statement was made indicates a negative personal trait").

2. Nor is any question presented here as to how the statutes should be applied to disclosures that occur after an intercepted communication has become public knowledge. Although the statutes are silent on the subject, it apparently was Congress' intent that "[t]he disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited." S. Rep. No. 90-1097, at 93. The special problems presented by such cases need not be considered here.

3. Furthermore, this case was decided on summary judgment proceedings in which, as the District Court determined, petitioners produced sufficient evidence to support their allegations that each respondent "knew or had reason to know that the private telephone conversation between Bartnicki and Kane was obtained surreptitiously through the illegal interception of their telephone conversation." JA 27 (Amended Complaint ¶¶ 17-18). *See* Pet. App. 68a (District Court decision). On appeal, "[t]he parties d[id] not challenge" the District Court's conclusion "that genuine disputes of material fact remain regarding . . . whether any or all of the defendants knew or had reason to know that th[e] conversation was illegally intercepted." Pet. App. 10a (Court of Appeals decision). Accordingly, as the case comes to this Court it must be taken as true that respondents disclosed "material they kn[e]w or ha[d] reason to know was illegally intercepted." Pet. App. 17a (Court of Appeals decision).

4. Petitioners have requested statutory damages and punitive damages (but not compensatory damages). *See supra* at 9. However, liability has not yet been found, and there have been no proceedings with respect to damages. Consequently, the Court is not called upon in this case to determine whether either the statute or the First Amendment makes any particular kind of damage award subject to special proof requirements or other

limitations. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974) (limiting grounds for awarding presumed damages and punitive damages for defamation).

5. Even if the intercepted telephone conversation could be characterized as revealing plans to commit a crime—which is a fanciful interpretation of what was being expressed, *see supra* at 5 and n.1 – this case does not involve any communication with law-enforcement officials, and thus does not implicate "the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials." *Branzburg v. Hayes*, 408 U.S. 665, 698 (1972) (quoting *Roviaro v. United States*, 353 U.S. 53, 59 (1957)). Yocum took the tape of the conversation not to the police, but to a talk show host.

6. Finally, this case involves no prior restraint on publication or disclosure of information. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *id.* at 725-726 (Brennan, J., concurring); *id.* at 730-731 (White, J., concurring); *id.* at 748 (Burger, C.J., dissenting); *id.* at 754, 759 (Harlan, J., dissenting); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in Chambers) (staying injunction against broadcast of videotape footage obtained by an undercover camera, because "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for . . . misdeeds in the First Amendment context") (citing *New York Times v. United States).*

The sole question to be decided here is whether the First Amendment invalidates the state and federal wiretapping statutes to the extent that those statutes create a cause of action against a person for having distributed, or for having played to others, a recording of a conversation the defendant knew or had reason to know was unlawfully intercepted. As we will show, the statutes as so applied are subject only to intermediate scrutiny under the First Amendment, and they easily satisfy such scrutiny.

I. BECAUSE THE CHALLENGED PROVISIONS APPLY TO ALL UNLAWFULLY INTERCEPTED COMMUNICATIONS REGARDLESS OF THEIR CONTENT, THE PROVISIONS ARE SUBJECT ONLY TO INTERMEDIATE SCRUTINY

The provisions of 18 U.S.C. § 2511(1)(c) and 18 Pa. Cons. Stat. § 5703(2) that prohibit the intentional disclosure or other use of unlawfully intercepted communications are not "content-based speech restriction[s] [that] can stand only if [they] satisf[y] strict scrutiny." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000). Rather, these provisions are to be assessed under the familiar standard of intermediate scrutiny articulated in such cases as *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *United States v. O'Brien*, 391 U.S. 367 (1968): the provisions must be "sustained if '[they] further[ ] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broadcasting*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377)).

1. "Deciding whether a particular regulation is content-based [and hence subject to strict scrutiny] or content neutral [and subject only to intermediate scrutiny] is not always a simple task." *Turner Broadcasting*, 512 U.S. at 642. In this case, however, it is quite clear that the statutes are content-neutral.

a. In the first place, these statutes do not single out speech for any special prohibition; they proscribe not only publication, but any kind of "use" of a communication that the user (including even the government, *see* 18 U.S.C. § 2515) knows or has reason to know was obtained through unlawful interception. *See* 18 U.S.C. § 2511(1)(d); 18 Pa. Cons. Stat. § 5703(3). Indeed, the complaint in this action invokes the "use" prohibitions in tandem with the "disclosure" prohibitions. JA 27-29. The

case therefore is "controlled by . . . the . . . well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). The dissenters in *Cohen* agreed with the majority that such laws are not subject to strict scrutiny. *Id.* at 677 (Souter, J., dissenting) (stating that the proper approach is to "compare the competing interests involved . . . to determine the legitimacy of burdening constitutional interests").

b. Even if the challenged nondisclosure provisions are viewed in isolation rather than as part of a broader proscription of all uses of illegally intercepted communications, these provisions are content-neutral.

Under this Court's precedents, the question whether a law is content-neutral or content-discriminatory turns on whether the law imposes restrictions on "particular viewpoints" or particular "subject matter," *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-538 (1980) – that is to say, whether the law "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the *ideas or views* expressed," *Turner Broadcasting*, 512 U.S. at 643 (emphasis added). *See also Hill v. Colorado*, 120 S. Ct. 2480, 2500 (2000) (Souter, J. concurring) (strict scrutiny applies if a law "suppress[es] discussion of a subject or a point of view").

Unlike laws that impose restrictions on speech because of the subjects or viewpoints expressed, the provisions at issue here "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny." *Turner Broadcasting*, 512 U.S. at 661. The statutes' prohibitions apply entirely irrespective of the subject of an intercepted communication or the viewpoint, if any, expressed in it. Nor does liability turn on the views or ideas expressed by the

person who makes the unlawful disclosure. And the statutes apply to every kind of speaker, in every context and setting.[3]

Thus, unlike content-based statutes, the provisions at issue here do not "'lend[] [themselves]' to being 'used for invidious thought-control purposes.'" *Hill*, 120 S. Ct. at 2493 (opinion of the Court) (quoting *id.* at 2504 (Scalia, J. dissenting)).[4] And "[t]he principal inquiry in determining content neutrality," *id.* at 2491 (opinion of the Court), namely, " whether the government has adopted a regulation of speech because of disagreement with the message it conveys," *id.*,[5] is readily answered here: these statutes plainly were not adopted for such a reason.

2. This Court's decisions make it plain that a law which prohibits disclosure of material not because of its content, but because of the manner in which the material was obtained, is not subject to strict scrutiny.

[3] The content-neutrality inquiry here is thus more straightforward than in *Hill*, where the challenged statute, although not confined on its face to specified subjects, *was* confined to "protest, education, or counseling," which in turn arguably are associated with certain kinds of subjects. *See* 120 S. Ct. at 2504 (Scalia, J., dissenting). The statute in *Hill* also was confined to speech in certain locations, raising the possibility that the statute's selectivity might operate as a "[cl]ever content-based restriction[ ]." *Id.* at 2517 (Kennedy, J., dissenting). Nor is this a situation such as was presented in *Turner Broadcasting*, where an ostensibly neutral statute was based on legislative judgments that arguably embodied the government's preference for particular subject matters. *See* 512 U.S. at 676-677 (opinion of O'Connor, J.).

[4] *See also City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (strict scrutiny applies to "content-based speech restrictions [because such restrictions] are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate").

[5] *See also id.* at 2500-2501 (Souter, J., concurring) (same); *Turner Broadcasting*, 512 U.S. at 642 (same); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (same).

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), a unanimous Court applied intermediate scrutiny in reviewing an order that prohibited dissemination of information obtained in discovery. *See id.* at 32. The Court emphasized that the order under review was predicated on the means through which the information in question had been obtained, and "the party may disseminate the identical information . . . as long as the information is gained through [other] means." *Id.* at 34.

Equally instructive are this Court's decisions reviewing laws that prohibit publication in order to protect economic interests in the material sought to be published. As in this case, liability under those laws is based solely on the extent to which a publication was derived from a particular source; and the Court has not subjected such laws to strict scrutiny. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (Copyright Act); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (tort action against television station for misappropriating a performer's "right of publicity" by broadcasting a film showing his act).

So too, in applying strict scrutiny to a statute that prohibited a grand jury witness from "divulg[ing] information of which he was in possession before he testified before the grand jury," *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), the Court explained that the less stringent test of *Seattle Times v. Rhinehart* would have been appropriate had the statute prohibited disclosure only of information "obtained as a result of . . . participation in the proceedings of the grand jury." *Butterworth*, 494 U.S. at 631-632. The Court thus applied strict scrutiny to a prohibition that may fairly be characterized as having been based on subject matter,[6] while indicating that intermediate scrutiny

[6] A prohibition of disclosure of information presented to a grand jury may be viewed as content-based because it is confined to information relating to the government's attempt to secure an indictment. What is more, that prohibition applies exclusively to statements made to a public body, and a body,

would apply if , as here, the prohibition were based solely on the means by which the information had been acquired.[7]

3. The foregoing analysis is perfectly consistent with the line of cases in which this Court has held that laws prohibiting the media from disclosing facts regarding specified subjects must satisfy a rule of strict scrutiny under which, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

The cases governed by that rule all have involved laws or orders that prohibited *publication of facts pertaining to particular subjects specified by the government*, and nothing else. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 526 n.1 (1989) (statute prohibited publication of "the name, address, or other identifying fact or information of the victim of any sexual offense"); *Daily Mail*, 443 U.S. at 98 (statute prohibited publication of the name of any youth charged as a juvenile offender); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam) (pretrial order enjoined members of news media from disclosing the name of a boy charged in a juvenile criminal proceeding); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471 n.1 (1975) (statute prohibited publication of "the name or iden-

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moreover, that has as one of its chief functions "to safeguard citizens against an overreaching [government] and unfounded accusations." *Id.* at 629.

[7] *Cohen v. Cowles Media Co.* is yet another case in which the Court did not find strict scrutiny to be triggered by a law that prohibited publication of information, where the prohibition was predicated on the circumstances in which the information had been obtained. *See Cohen*, 501 U.S. at 671 (strict scrutiny not warranted where state law prohibited publication of the plaintiff's name because "respondents obtained Cohen's name only by making a promise that they did not honor").

tity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made").[8]

What is more, in those cases, not only did "the State . . . define[ ] the content of publications that would trigger liability," *Cohen*, 501 U.S. at 670, but the challenged restrictions *discriminated among speakers*: the publication ban was imposed only on the media, or on some segment thereof, while all others were left free to disclose the same information. *See Florida Star*, 491 U.S. at 526 n.1, 540 (statute applied only to "instrument[s] of mass communication"); *Daily Mail*, 443 U.S. at 98, 104-105 (newspapers); *Oklahoma Publishing*, 430 U.S. at 308 ("the news media"); *Cox Broadcasting*, 420 U.S. at 471 n.1 ("medi[a] of public dissemination"). That feature in itself called for heightened scrutiny. *See Turner Broadcasting*, 512 U.S. at 640-641.[9]

Nothing in the *Daily Mail* line of cases suggests that strict scrutiny is required where a law is addressed equally to all speakers and prohibits disclosure not because of the subject matter involved, but because of the manner in which the information was acquired. On the contrary, the Court recognized in *Florida Star* that "[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired

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[8] *See also Butterworth*, 494 U.S. at 632 (*Daily Mail* standard applied because the law prohibited disclosure of all information presented by a witness to a grand jury, even if the information was obtained through other means); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 831 (1978) (statute prohibited "divulg[ing] the identification of a Judge [who] was the subject of an investigation and hearing" before the state Judicial Inquiry and Review Commission).

[9] That the statute prohibited disclosure of information only by certain speakers and not by others was the sole ground on which Justice Scalia concurred in *Florida Star*, *see* 491 U.S. at 541-542 (opinion of Scalia, J.), and on which then-Justice Rehnquist concurred in *Daily Mail*, *see* 443 U.S. at 110 (Rehnquist, J., concurring in judgment).

unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8 (emphasis by the Court). The Court explained that, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.* at 534.[10]

Thus, this case is "outside of the *Daily Mail* principle," and the challenged provisions are subject only to intermediate rather than strict scrutiny.

II. THE STATUTES AS APPLIED HERE SATISFY THE REQUISITE SCRUTINY

The state and federal prohibitions of disclosure or other use of unlawfully intercepted communications, as applied in this case, must be sustained because "[they] further[ ] an important or substantial governmental interest; . . . the governmental interest is unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential the furtherance of that interest." *Turner Broadcasting*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377). Indeed, for the reasons that follow, these provisions would satisfy even the most strict First Amendment scrutiny.

A. The Statutes Were Enacted to Combat a Serious National Problem

In enacting Title III in 1968, Congress found that the growth of communications technology had been accompanied by "the

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[10] *See also Cox Broadcasting*, 420 U.S. at 489 (distinguishing tort doctrines under which liability turns on whether publicity is "offensive" from "an action for the invasion of privacy involving the appropriation of one's name or photograph, [or] a physical or other tangible intrusion into a private area").

widespread use and abuse of electronic surveillance techniques," through which "privacy of communication is seriously jeopardized" and "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. Rep. No. 90-1097 at 67. Congress therefore acted to prohibit the interception of any "wire or oral communication," and to prohibit as well the disclosure or other use of such intercepted communications by a person who knows or has reason to know that a communication was unlawfully intercepted. Pub. L. No. 90-351, § 802 (1968).

The 1968 statute did not expressly cover *electronic* communications, such as those conducted by cellular telephone or computer e-mail, and Congress soon came to recognize that those emerging technologies posed an even more severe threat to the security and privacy of communication.

Senator Leahy opened hearings in 1984 on "the electronic revolution [and its] effect on our lives and our sense of privacy" by noting that "[w]e send sophisticated legal documents, a bid, a love letter [electronically]. It makes no difference what it might be. People assume that—the average person assumes he is protected against wiretapping as they would as if they were on [a conventional] phone, but as a practical matter they are not. And what happens is a case where technology eats away at what we assume are our protections . . . . But I do not think that erosion of rights is inevitable." *Privacy in Electronic Communications: Hearings Before the Subcommittee on Patents, Copyrights and Trademarks, Senate Committee on the Judiciary*, 98th Cong., 2d Sess. 1-2 (1984) ("1984 Hearings") (Statement of Sen. Leahy). Senator Mathias similarly stated in the 1984 Hearings that "[t]he users of these new [technologies]—and that means all of us—expect legal protection against unwarranted interceptions of this communications stream, whether by overzealous law enforcement officers or private snoops." *Id.* at 3.

The next Congress passed the Electronic Communications Privacy Act ("ECPA"), amending Title III to cover electronic communications, so that "the new technological equivalents of telephone calls, telegrams, and mail are afforded the same protection provided to conventional communications." *Electronic Communications Privacy Act: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Senate Committee on the Judiciary*, 99th Cong., 1st & 2d Sess. 2 (1986) ("1986 Hearings") (Statement of Sen. Kastenmeier). Congress found the legislation necessary because "tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," such that private information "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, at 3.[11] To address that problem, Congress enacted "Federal statutory standards to protect the privacy and security of communications transmitted by new noncommon carrier communications services or new forms of telecommunications and computer technology," which "American citizens and American businesses are using . . . in lieu of, or side-by-side with, first class mail and common carrier telephone services." *Id.* at 5.

The particular kind of interception involved in this case—the use of a scanner to record a cellular telephone conversation—is, in itself, a major threat to the privacy and security of communications in our society. It is estimated that between ten and twenty million scanners are currently in operation in this country. Kimberly R. Thompson, *Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished*, 35 Am. Crim. L. Rev. 137, 149 (1997). Even though it has been illegal since 1993 to manufacture scanners equipped with the capability to intercept cellular transmissions, *see* 47 U.S.C. § 302a(d), millions of scanners manufactured before that ban remain in use, and even scanners that comply with § 302a(d) can easily be modified to intercept cellular phone calls. 35 Am. Crim. L. Rev. at 151. Furthermore, as was pointed out in the 1984 Hearings, a person speaking on a conventional telephone is subject to having his conversation intercepted by a scanner if the other party to the call is using a cellular phone; and the person using the conventional phone generally will have no way of knowing that the other party is using a cellular phone. 1984 Hearings at 45, 47 (statement of Stephen Schachman on behalf of the Cellular Communications Industry Association).

[11] *See also id.* at 18 ("[S]ince Congress last addressed the issue of privacy communications in a comprehensive fashion, the technologies of communication and interception have changed dramatically, and are expected to continue to do so. These factors have raised serious issues about the protection of the privacy interests of U.S. citizens, which are of great concern to the Senate and the American people.")

The other principle forms of electronic communication with which these statutes are concerned—e-mail and other computer-generated communications—also are frequent targets of interception. There consequently can be no doubt as to the importance of the problem Congress addressed in the amended Title III, and that the legislatures of Pennsylvania and some forty other states have addressed in similar fashion.[12]

B. The Statutes Promote Important Governmental Interests Unrelated to the Suppression of Free Expression by Protecting Individuals From Unjustifiable Intrusion Into Their Private Communications, Thereby Avoiding a Chill on Free Expression and Promoting the Development and Use of New Technologies to Enhance Communication

It is apparent from what we have said to this point that these statutes promote important governmental interests.

[12] The state laws addressing this subject are described in the Addendum to this brief.

An individual's "expectation of . . . the confidentiality of his conversations" is a matter "to which we accord deference for the privacy of all citizens." *United States v. Nixon*, 418 U.S. 683, 708 (1974). That expectation is part of "the . . . 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" *Hill v. Colorado*, 120 S. Ct. at 2489 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). This is "accurately characterized as an 'interest' that [the government] can choose to protect in certain situations," *Hill*, 120 S. Ct. at 2490 n.24; and it is precisely that interest that Congress and the Pennsylvania legislature have sought to protect in the statutes at issue here. *See* S. Rep. No. 90-1097, at 170 (Additional Views of Sen. Hart) ("[w]iretapping and other forms of eavesdropping are recognized . . . as encroachments on a man's right to privacy, characterized by Justice Brandeis as 'the most comprehensive of rights and the right most valued by civilized men'").[13]

It is difficult to conceive of a more fundamental assault on individual privacy and autonomy than the broadcast of a tape, made through surreptitious electronic surveillance, in which the participants to a private conversation speak unguardedly of their friends and adversaries, talk in deepest confidence of their strategy regarding a labor dispute, and even give out their telephone numbers.

But more than simple privacy is at stake here. The "freedom *not* to speak publicly," *Harper v. Row*, 471 U.S. at 559 (emphasis by the Court), which is promoted by these statutes, "serves the same ultimate end as freedom of speech in its affirmative

[13] As Senator Hart observed, in the 1967 State of the Union address, when President Johnson explained why the administration supported the legislation that became ECPA, he also quoted Justice Brandeis' famous statement. *Id.* at 172.

aspect," *id.*[14] That point was brought home to Congress in the 1967 report by the President's Commission on Law Enforcement and Administration of Justice, which played a crucial role in directing Congress' attention to the problems that were addressed the next year in Title III:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.
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> External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of [a free] society.
>
> Today, in addition to some law enforcement agents, numerous private persons are utilizing these techniques.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (Feb. 1967).

In the 1984 and 1986 Hearings, several witnesses explained in concrete terms why legal protection of the privacy and security of electronic communications is necessary if individuals are

[14] Just as "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'," *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 16 (1986)), it likewise is an important manifestation of the principle of free speech that one who chooses to speak may also decide to whom he will and will not convey a particular message. This "First Amendment right to exclude," *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2407 n.5 (2000), applies both to speech and to association. *See Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

to have the confidence to make full and free use of these important channels of communication. An attorney for AT&T testified in the 1984 Hearings that "[a]ny undermining of this confidence would seriously impair the usefulness and value of telecommunications," and for that reason "we strongly oppose any invasion of the privacy of communications by illegal wiretapping and, accordingly, welcome Federal and State legislation that would comprehensively protect and strengthen such privacy." 1984 Hearings at 4 (Statement of H.W. William Caming, attorney for AT&T). In the 1986 Hearings, the point was driven home more explicitly, not only by representatives of industry,[15] but by the manager of the Communication and Technologies Program of Congress' Office of Technology Assessment, who testified as follows:

> There are two dangers in leaving this type of new application unprotected. One danger, of course, is a gradual erosion of privacy, a loss of the right to whisper and to keep our dealings confidential. The other danger is that we may

[15] *See e.g.*, 1986 Hearings at 93 (Statement of John W. Stanton, Chairman, Telocator Network of America, and Executive Vice President, McCaw Communications Co.) ("The absence of the law [extending Title III to electronic communications] has, and I believe will continue to inhibit the growth of the industry, and inhibit the improvement in technology . . . The inhibition of the growth of cellular technology and paging technology, forced by lack of privacy, is unfair because it precludes customers, potential customers, citizens, from getting access to a new technology that will provide service and allow them to live their lives more conveniently and in a better way"); *id.* at 39 (Statement of Philip J. Quigley, President and Chief Executive Officer, Pactel Mobile Co.) (cellular communication will "proliferate with further assurances of privacy"); *id.* at 155 (Statement of George A. Kuhnreich, Vice President, Tandy Corp.) ("As a practical matter, Tandy believes that the extension of privacy protection to cellular communication will help ensure the continued growth and vitality of the cellular industry. . . Tandy thus submits that the extension of privacy coverage of the cellular communications could well serve the dual goals of fostering competition among the communications services, and encouraging the utilization of the state-of-the-art technology").

> be denied useful applications and useful new technologies because they're unprotected. Consumers and users simply will not use these services if they are not properly protected, and they will not be developed and offered in the marketplace.
>
> * * * * *
>
> In-home and office information services – banking, videotex, and so on – might simply not be developed in the United States because consumers, concerned about their privacy, would not use them. If use of cellular telephones were to be inhibited because people were concerned about their privacy, the U.S. development of that technology could also be inhibited; resulting in a negative impact on our trade in these products and services.

1986 Hearings at 44, 70 (Statement of Frederick W. Weingarten, Communication and Information Technologies Program Manager, United States Congress Office of Technology Assessment).

In those hearings, Senator Leahy expressed the view that the proposed statute "will go a long way toward providing the legal protections of privacy and security which are necessary to ensure the continued growth of new communications technologies." *Id.* at 4. When the 1986 legislation was enacted, the Senate Report made the same point, observing that the lack of legal protection against interception "may unnecessarily discourage potential customers from using innovative communications systems . . . [and] may discourage American businesses from developing new innovative forms of telecommunications and computer technology." S. Rep. No. 99-541, at 5.

Petitioner Bartnicki's testimony in this case attests to the validity of Congress' concern. When asked whether the events here have "altered the way in which [she] uses [her cellular] phone," Ms. Bartnicki stated:

> Yes . . . I always think that there's somebody listening. I try to be extremely careful with what is said on the phone. It's cut down my efficiency in the job . . . because I use the phone quite a bit in my job and I hesitate to do that now. [JA 108]

By enacting provisions to address the serious problem of interception of electronic communications, Congress—and the forty state legislatures that have enacted similar laws —have protected the unquestionably important interest of individuals in being free from the intrusion of electronic surveillance, and in having a right of redress when such unlawful intrusion does occur. At the same time, by protecting the right of individuals *not* to speak *publicly*, the legislatures have *enhanced* the freedom of individuals to speak *privately*, and, in particular, to make use of new technologies that contribute both to the maximization of communication and to the advance of the economy. These plainly are "important or substantial governmental interest[s]," *Turner Broadcasting*, 512 U.S. at 662, "unrelated to the suppression of free expression," *id.*

C. The Prohibitions of Disclosure and Other Uses of Unlawfully Intercepted Communications Serve the Same Important Interests as the Interception Prohibition Itself, and are Necessary to Protect Those Interests

The points just made hold true not only with respect to the statutory prohibition of interception, but also with respect to the provisions prohibiting the disclosure or other use of communications that a person knows or has reason to know were unlawfully intercepted.

1. Disclosure of an intercepted communication harms the same interests as are harmed by the interception itself. As this Court explained in holding that a grand jury witness cannot be compelled to answer questions based upon the illegal interception of his communications, "contrary to the . . . assertion that

the invasion of privacy is over and done with" when the interception occurs, to require a witness to disclose the substance of an intercepted communication "compounds the statutorily prescribed invasion of . . . privacy by adding to the injury of the interception the insult of compelled disclosure." *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). "The protection of privacy—one of the purposes of Title III and [similar state] law[s]—requires strict controls on the repetition of the contents of illegally intercepted communications," *Nix v. O'Malley*, 160 F.3d 343, 351 (6th Cir. 1998), because "[e]ach time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated," *id.* (quoting *Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991)). *See also Providence Journal Co. v. Federal Bureau of Investigation*, 602 F.2d 1010, 1013 (1st Cir. 1979) ("Congress' recognition of the victim's privacy as an end in itself recognizes that the invasion of privacy is not over when the interception occurs but is compounded by disclosure"), *cert. denied*, 444 U.S. 1071 (1980)).

Just as the intrusiveness of a Peeping Tom would be magnified if he were to invite others to look through a keyhole he had made, the intrusion worked by the interception of an electronic communication would be magnified if (to posit a situation which, remarkably, is not fanciful[16]) the operator of a scanner were to broadcast over a public address system what he is receiving. And, insofar as the nature of the injury is concerned, it matters not that, as here, the broadcast occurred at a time removed from the interception and the broadcaster was not the person responsible for the initial interception. The harm to the victim is precisely the same. "None of us is so circumspect in our speech that we can countenance the later use of our most

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[16] "One journalist writes of visits to 'garages, cafes and service stations where scanners were turned up to broadcast telephone conversations for the entertainment of customers and workers.' " 35 Am. Crim. L. Rev. at 150.

private utterances, played with the shattering impact of a broadcast in our own words." S. Rep. No. 90-1097, at 175 (Additional Views of Sen. Hart).

To recognize as much is not to countenance any form of content-discriminatory legislation; rather, it is to acknowledge that one of the principal reasons that our society recognizes a value in preventing intrusion into privacy is to protect personal autonomy in a manner that is shattered if the fruits of the intrusion are published to all the world. The statutory provisions challenged here that prohibit the disclosure and other use of unlawfully intercepted communications, regardless of their content, thus promote our citizens' "expectation of . . . the confidentiality of . . . conversations," *Nixon*, 418 U.S. at 708—their "right to be let alone," *Hill v. Colorado*, 120 S. Ct. at 2489.[17]

2. Congress and the Pennsylvania legislature were justified in proscribing the disclosure or other use of intercepted communications not only because such conduct—whether by the interceptor or a third party—compounds the kind of injury the legislatures properly sought to prevent, but also because these prohibitions are necessary to a coherent and effective enforcement scheme.

The danger that individuals will be afraid to make use of electronic communications media or will limit what they communicate over such media because of concerns about privacy and security would hardly be eased by a statutory regime under which interceptors might be punished but confidential information could be disclosed with impunity by third parties. And, as illustrated by this case and by *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000)

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[17] *Cf. Time Inc. v. Hill*, 385 U.S. 375, 384-385 n.9 (1967) (distinguishing cases where liability is based on the contents of a publication from cases involving "state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices").

(No. 99-1709), among the millions of people who operate scanners in this country (to say nothing of those who attempt to pry into e-mail or other electronic communications) are many who are quick to pass along to others whatever items of interest their surveillance may uncover. To hold that such "laundering" of intercepted communications makes them fair game for disclosure would leave a gaping hole in the statutes.

What is more, as Congress was well aware, the identities of those directly involved in an unlawful interception "[a]ll too often . . . will go unknown." S. Rep. No. 90-1097, at 69. "It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping," *Boehner*, 191 F.3d at 470, because such a restricted field of enforcement would mean that in many cases—such as this one—an unlawful interception could be followed by mass disclosure of the purloined communication and yet the victim would have no redress at all.

It also is very much to the point that, "[u]ness disclosure is prohibited, there will be an incentive for illegal interceptions." *Id.* Just as this Court has found it reasonable to assume that the Fourth Amendment exclusionary rule will "deter unreasonable searches," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985), the Court has found it "surely reasonable," *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), for a legislature to act on the principle that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market," *New York v. Ferber*, 458 U.S. 747, 760 (1982). By "drying up the market" for unlawfully intercepted communications, the prohibitions of disclosure and other uses reduce the incentives to intercept electronic communications in the first place.[18]

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[18] The Third Circuit refused "to accept the . . . allegation" that prohibiting disclosure and use will tend to deter interception, because no evidence was offered in support of that proposition. Pet. App. 33a-34a. However, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibil-

3. All of this being so, it is apparent that "the incidental restriction on alleged First Amendment freedoms" that flows from the challenged provisions "is no greater than is essential to the furtherance of [the government's substantial] interest[s]." *Turner Broadcasting*, 512 U.S. at 662.

To pass muster under the level of scrutiny that applies in this case, "a regulation need not be the least speech-restrictive means of advancing the Government's interests. 'Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." ' " *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (in turn quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). These statutes easily pass that test; indeed, they would satisfy even the least-restrictive-means requirement that obtains in cases of content discrimination where strict scrutiny is applied.

Insofar as disclosure is prohibited by these statutes because it "compounds the statutorily proscribed invasion of . . . privacy," *Gelbard*, 408 U.S. at 52, *see supra* at 34-35, it is obvious that the prohibition of disclosure is indispensable to advancing the government's legitimate interests.[19] And, to the extent that the

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ity of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 900 (2000). The concept of "drying up the market" is surely plausible; and it is hardly novel, underlying as it does a host of statutes dealing with such matters as distribution of child pornography (*Ferber* and *Osborne*) and trafficking in stolen goods. Furthermore, it would be virtually impossible to develop empirical evidence to prove the extent to which prohibiting disclosure deters interception; no experiment could be conducted to yield such proof. Congress should not be required here to prove the unprovable.

[19] To suggest that the prohibition might better have been confined to disclosures of particular types of intercepted material would miss the point. Senator Hart's cogent observation that "[n]one of us is so circumspect in our speech that we can countenance the later use of our most private utterances,

prohibition is viewed as promoting free expression by enhancing the security of electronic communication, *see supra* at 36, or as serving to provide redress to victims of unlawful interception who otherwise would have no remedy, *see supra* at 37, or as tending to deter interception, *id.*, the proscription likewise "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broadcasting*, 512 U.S. at 662.

In sum, unless the special interests of the media and its sources are of such constitutional dimension as to trump even the most substantial governmental interests in preventing intrusion into private communications, Title III and the Pennsylvania statute, as applied in this case, must be substained. As we now show, there is no such media or informant privilege to traffic in stolen communications.

D. This Court's Decisions Establish that Where, as Here, a Communication is Protected as Confidential by a Content-Neutral Law, the Media Have No First Amendment Privilege to Broadcast that Communication

1. There is nothing new in the proposition that, where a content-neutral law protects a communication as confidential, the media have no First Amendment privilege to broadcast that communication.

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played with the shattering impact of a broadcast in our own words," S. Rep. 90-1097, at 175, is not confined to any limited set of subjects. Further, "[h]ere, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive," *Hill v. Colorado*, 120 S. Ct. at 2497, and because any attempt to confine the disclosure prohibition to communications involving particular subjects or particular levels of sensitivity would raise problems of content discrimination. *Cf. Time, Inc. v. Hill, supra.*

In *Harper & Row*, The Nation Magazine argued vigorously that the First Amendment gave it the right to publish a highly newsworthy article drawn from the purloined and yet-to-be-published memoirs of President Ford. This Court disagreed, stating that, "[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression." 471 U.S. at 558. As the Court explained, by denying strangers the right to publish another's speech, the copyright laws promote the "freedom *not* to speak publicly, which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id.* at 559. In that context, as here, a person's willingness to speak is enhanced by the knowledge that others cannot trespass on or traffic in his expression. Just as President Ford and his prospective publisher had a legitimate interest in seeking redress from The Nation for disclosing the contents of his memoirs without his permission, petitioners here have a legitimate interest in seeking redress from respondents for disclosing the contents of their unlawfully intercepted communication. In both cases, the legislation protecting those interests serves in the final analysis to promote First Amendment values. *Harper & Row*. *See also Zacchini*, *supra*.

So too, in *Seattle Times v. Rhinehart*, the interests served by an order protecting the confidentiality of information produced in civil discovery, including the possible impact on privacy if the information were disclosed, *see* 467 U.S. at 36-37, were held to justify a prohibition—indeed, a prior restraint—of a newspaper's publication of an article containing information of public concern that had been obtained through discovery. *See id.* at 22, 31-37. And in *Cohen v. Cowles Media Co.*, a state's interest in applying its law of promissory estoppel to enforce a promise of confidentiality given to a source in exchange for information was sufficient to warrant holding a newspaper liable for having published the individual's name, *see* 501 U.S. at 669-672, despite the fact that the identity of the individual—a political figure associated with a gubernatorial campaign—was of such public importance that "[a]n election could turn on just such a factor," *id.* at 678 (Souter, J., dissenting).

Harper & Row, *Seattle Times*, *Cohen* and this case are illustrations of the principle recognized in *Florida Star*, 491 U.S. at 534, that, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside the *Daily Mail* principle the publication of any information so acquired." In such a case, one need not doubt the importance of a free press or the need for "some protection for seeking out the news," *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), to recognize that, "[a]lthough stealing documents or private wiretapping could provide newsworthy information, *neither reporter nor source* is immune from conviction for such conduct, whatever the impact on the flow of news," *id.* at 691 (emphasis added). "The [First] Amendment does not reach so far as to override the interest of the public in ensuring that *neither reporter nor source* is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." *Id.* at 691-692 (emphasis added). Our Constitution simply does not require that we tolerate "a private system of informers" to gather the news, *id.* at 697, and such a system "would pose a threat to the citizen's justifiable expectations of privacy," *id.*[20]

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[20] In enacting Title III, Congress was cognizant of the legitimate needs of the media, and Congress was sensitive to First Amendment values. Indeed, Congress clarified the statutory provision that generally allows recording of a communication by a party to the communication without the consent of the other party, *see* 18 U.S.C. § 2511(2)(d), so as not to "place[ ] a stumbling block in the path of . . . scrupulous journalist[s]." S. Rep. No. 99-541, at 17. The Senate Report explained that "[m]any news stories have been brought to light by recording a conversation with the consent of only one of the parties involved—often the journalist himself." *Id.* The Report stated that even if such a news story proved "embarrassing to someone," *id.*, the journalist should not face a threat of liability for such "responsible news-gathering ac-

2. Nothing in the *Florida Star* line of cases casts any doubt on these principles.

In the first place, as we have explained, each of those cases involved a law that (a) prohibited publication and nothing else, (b) applied only to the media or some segment thereof, and (c) banned the publication of information on specifically designated subjects. For those reasons, the laws were presumptively unconstitutional and were subject to strict scrutiny. *See supra* at 24-26. The statutes before the Court in this case are not of such a nature.

Second, in none of the *Florida Star* line of cases did the challenged laws serve to *promote* open communication or other free speech values, as is the case here. *See supra* at 30-34, 40.

Finally, to the extent that the laws in *Florida Star* and its precursors may have involved interests at all akin to those involved here,[21] the laws failed strict scrutiny not because the Court

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tivities," *id.*, because "[s]uch a threat is inconsistent with the guarantee of the first amendment," *id.*

Interception of an electronic communication such as occurred in this case is, of course, fundamentally different from the situation where a party to a telephone conversation knows that the other party may repeat (or even record) what is said. Interception by electronic surveillance is "a classic case of the invisible third party whose presence is not detectable by anyone involved in the conversation." Diane L. Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. Rich L. Rev. 1185, 1232 n. 144 (2000).

[21] Any such kinship is quite distant. None of those cases involved any interest in being free from electronic surveillance or any other form of unlawful intrusion. On the contrary, in *Cox Broadcasting* the Court observed that, although "[there] are impressive credentials for a right of privacy," 420 U.S. at 489, the case presented there did not involve "intrusion," but rather a cause of action for disclosing information that, because of its content, "would be offensive to a person of ordinary sensibilities," *id.* In *Daily Mail*, "there [wa]s no issue . . . of privacy," 443 U.S. at 105; rather, the interest proffered by the state was one of "further[ing] [the] rehabilitation" of juvenile offend-

deemed those interests unimportant, but because the challenged laws could not fairly be portrayed as serving such interests in any meaningful way.

In each of those cases, the information at issue had been provided to the media *by the government itself*. *See Florida Star*, 491 U.S. at 527 (reporter obtained the name of a rape victim from a police report that was publicly available in the police pressroom); *Daily Mail*, 443 U.S. at 99 (reporters obtained the name of a juvenile offender "simply by asking various witnesses, the police, and an assistant prosecuting attorney"); *Oklahoma Publishing*, 430 U.S. at 309, 311 (reporter learned the name of a juvenile offender from a proceeding in open court); *Cox Broadcasting*, 420 U.S. at 472-73 (reporter learned the name of a rape victim from "public records available for inspection").

Thus, as the *Florida star* Court took pains to emphasize, the laws under attack in those cases simply were not needed in order to protect confidentiality, because the government could have provided the desired protection by not divulging the information in the first place. *See* 491 U.S. at 534. As the Court further explained, the fact that the government *did* divulge the information—and that it permitted all persons other than certain segments of the media to publicize the information—belied the government's contention that its selective ban on publication was a narrowly tailored means of protecting confidentiality. *Id.* at 535-536, 538, 540 (opinion of the Court); *id.* at 541-542 (opinion of Scalia, J.). No such irrationality afflicts the statutes involved here.

Furthermore, the law in *Florida Star* had no scienter requirement. *Id.* at 539 (opinion of the Court). The provisions here, in contrast, apply only to a defendant who "know[s] or ha[s] rea-

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ers, *id.* at 104. *See also Landmark Communications*, 435 U.S. at 840-842 (interests of judicial administration).

son to know" that the communication he is disclosing was unlawfully intercepted. Those terms certainly can be construed to satisfy any First Amendment requirements that might be deemed applicable. We submit that it would be sufficient in that regard to construe "reason to know" in its ordinary sense, as meaning "that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." Restatement (Second), Torts, § 12(1). *See Novicki v. Cook*, 946 F.2d 938, 941-942 (D.C. Cir. 1991) (applying the Restatement definition in construing "reason to know" in a federal statute, and holding that the phrase is *not* to be equated with "should have known," and that it "imposes no duty of inquiry"). Because respondents did not challenge on appeal the District Court's determination that, for purposes of their motion for summary judgment, they must be deemed to have known or to have had reason to know that the Bartnicki/Kane conversation had been unlawfully intercepted, *see supra* at 18, the Court need not decide in this case whether, as a matter of statutory construction or First Amendment mandate, the Restatement formulation of "reason to know," or some other formulation, is the appropriate one to apply in this context.[22]

* * * * *

The Third Circuit's myopic refusal to acknowledge the substantial governmental interests served by these provisions stands in sharp contrast to the assessments of the other two Circuits that have considered the matter.

In *Boehner*, 191 F.3d at 470, the D.C. Circuit summed things up as follows:

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[22] Nor is any question presented here as to whether a more demanding scienter standard might properly be required for particular kinds of damage awards. *See supra* at 18-19.

> Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore "essential" for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of nondisclosure.

And in *Peavy v. WFAA-TV, Inc.*, No. 99-10272, 2000 U.S. App. LEXIS 18289, at *97-*98 (5th Cir. July 31, 2000), the Fifth Circuit concluded:

> The use and disclosure proscriptions do not burden substantially more speech than is necessary to further governmental interests in protecting the privacy of communications. Those interests would be achieved less effectively in the absence of such proscriptions, because the invasion of privacy that occurs with interception does not then end, but continues anew and spreads with each disclosure or other use of the interception.
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> Prohibiting interception alone is not sufficient to protect the privacy of communications. Without the use and disclosure proscriptions, government's efforts to prohibit interception would be far less effective, because a person who illegally intercepts a conversation and wishes to disclose it to the public can do so, at no risk to himself, by simply anonymously providing the contents of the communication—by use of a tape or otherwise—to third parties, such as the media, who have an interest in disclosing, or otherwise using, those contents (as in *Bartnicki*). Moreover, far greater damage to the interests sought to be protected results if, and when, such contents are paraded before the public through use and disclosure by non-interceptors, including the media.

The Third Circuit's opinion, which improperly insists on empirical proof of the deterrent effect of the anti-disclosure provisions and simply declines to consider the other manifestly important functions of the challenged provisions, provides no response to these points. Under the level of scrutiny that is appropriately applied to these content-neutral statutes (indeed, even under strict scrutiny), the provisions must be upheld because they advance important governmental interests that, far from being calculated to suppress free speech, serve to promote core First Amendment values.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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ADDENDUM

STATE STATUTES PROHIBITING THIRD-PARTY DISCLOSURE OR USE OF UNLAWFULLY INTERCEPTED COMMUNICATIONS

The following state statutes prohibit the disclosure and/or use of intercepted communications, without confining the prohibition to those individuals involved in the interception:*

Ala. Code §§ 13A-11-30 *et seq.* (1975) (making it illegal to "use[] or divulge[] information obtained through criminal eavesdropping, " with "criminal eavesdropping" defined as "intentionally using any device" to "overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication").

Alaska Stat. § 42.20.300(d) (Michie 1999) (person who has received or "become acquainted with" a "communication and who knows or reasonably should know that the communication and the information contained in it was obtained [unlawfully] may not divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication or any part of the communication"); *id.* § 42.20.310 (making it illegal to "use or divulge any information which the person knows or reasonably should know was obtained through the illegal use of an eavesdropping device for personal benefit or another's benefit" or to "divulge, or publish the existence, contents, substance, purport, effect, or meaning of any conversation the

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* Some of the listed statutes are not explicit with regard to whether the prohibitions apply to persons not involved in an interception; and some are not explicit with regard to whether electronic communications are covered.

In addition to the listed statutes, two States have enacted non-disclosure provisions that apply only where an employee of a communication service provider is involved. *See* Ariz. Rev. Stat. Ann. § 13-3006(1) (West 1989 & Supp. 1999); Conn. Gen. Stat. Ann. § 53a-188 (1994). Indiana limits the disclosure of *lawfully* intercepted communications. *See* Ind. Code § 35-33.5-5-3(a) (Michie 1998) (law enforcement officers); *id.* § 35-33.5-3(c) (other persons).

person has become acquainted with after the person knows or reasonably should know that the conversation and the information contained in the conversation was obtained through the illegal use of an eavesdropping device," and defining "eavesdropping device" as any device, except hearing aids, "capable of being used to hear or record oral conversation whether the conversation is conducted in person, by telephone, or by any other means").

Ark. Code Ann. § 5-60-120 (Michie 1997) (making it unlawful to "possess a recording" of a "wire, oral or telephonic communication" unless a party consented to the interception and recording of the communication).

Cal. Penal Code § 631 (West 2000) (making it illegal to "use[] * * * information" obtained via "unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument," or obtained via "read[ing]" or "learn[ing] the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within" California).

Colo. Rev. Stat. § 18-9-303 & 305 (1998) (person commits wiretapping if he "[k]nowingly uses for any purpose or discloses to any person the contents of any [intercepted] communication, or attempts to do so, while knowing or having reason to know the information was obtained" unlawfully).

Del. Code Ann. tit. 11, § 1336(b)(1) (1995) (making it illegal to "willfully disclose" or "willfully use * * * the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 1336(w) (providing private right of action).

D.C. Code Ann. § 23-542 (1996) (imposing criminal penalties on any person who "willfully discloses [or] willfully uses * * * the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication"); *id.* § 23-554 (providing private right of action).

Fla. Stat. Ann. § 934.03(1) (West 1996 & Supp. 2000) (prohibiting the "[i]ntentional[] use[] or disclos[ure of] the contents of any wire, oral, or electronic communication" by any person "knowing or having reason to know that the information was [unlawfully] obtained through the interception of a wire, oral, or electronic communication"); *id.* § 934.10 (providing private right of action).

Ga. Code Ann. § 16-11-66.1 (1999) (making it unlawful to "broadcast, print, or publish the contents of any communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone if the communication has been [unlawfully] intercepted").

Haw. Rev. Stat. Ann. § 803-42 (Michie 1999) (forbidding any person to "[i]ntentionally use[]" or "intentionally disclose[] * * * the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 803-48 (providing private right of action).

Idaho Code § 18-6702 (1997) (making it illegal to "willfully disclos[e]" or "willfully us[e] * * * the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 18-6709 (providing private right of action).

720 Ill. Comp. Stat. Ann. 5/14-2(b) (West 1993 & Supp. 2000) (person commits eavesdropping when he "[u]ses or

divulges * * * any information which he knows or reasonably should know was obtained through the use of an eavesdropping device," with "eavesdropping device" defined as "any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications," excluding hearing aids); *id.* 5/14-6 (providing private right of action).

Iowa Code Ann. § 808B.2 (West 1994 & Supp. 2000) (making it illegal to "[w]illfully disclose[]" or "[w]illfully use[] * * * the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 808B.8 (providing private right of action).

Kan. Stat. Ann. § 21-4002 (1995) (forbidding the "[d]ivulging, without the consent of the sender or receiver, [of] the existence or contents of [a] message if such person knows that the message was illegally intercepted, or if such person illegally learned of the message in the course of employment with an agency in transmitting it"); *id.* § 22-2518 (providing private right of action).

Ky. Rev. Stat. Ann. § 526.060 (Michie 1999) ("A person is guilty of divulging illegally obtained information when he knowingly uses or divulges information obtained through eavesdropping or tampering with private communications or learned in the course of employment with a communications common carrier engaged in transmitting the message.").

La. Rev. Stat. Ann. tit. 15, § 1303 (West 1992) (making it illegal to "[w]illfully disclose" or "[w]illfully use * * * the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 1312 (providing private right of action).

Me. Rev. Stat. Ann. tit. 15, § 710(3) (1980 & Supp. 1999) (imposing penalties upon person who "[i]ntentionally or knowingly discloses" or "[i]ntentionally or knowingly uses * * * the contents of any wire or oral communication, knowing that the information was obtained through interception"); *id.* § 711 (providing private right of action).

Md. Code. Ann., Cts. & Jud. Proc. § 10-402 (1995) (making it illegal to "[w]illfully disclose" or "[w]illfully use * * * the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 10-410 (providing private right of action).

Mass. Ann. Laws ch. 272, § 99(C)(3) (Law. Co-op. 1992 & Supp. 1998) (forbidding any person to "willfully disclose[]" or "willfully use[] * * * the contents of any wire or oral communication, knowing that the information was obtained through interception"); *id.* § 99(Q) (providing private right of action).

Mich. Comp. Laws Ann. § 750.539e (West 1991) ("Any person who uses or divulges any information which he knows or reasonably should know was obtained [through unlawful eavesdropping] is guilty of a felony * * * ."); *id.* § 750.539h (providing private right of action, but permitting actual damages only against person who eavesdrops).

Minn. Stat. Ann. § 626A.02 (West 1983 & Supp. 2000) (making it illegal to "intentionally disclose[]" or "intentionally use[] * * * the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic, or oral communication"); *id.* § 626A.13 (providing private right of action).

Mo. Ann. Stat. § 542.402 (West 1987 & Supp. 2000) (person commits felony if he "[k]nowingly discloses" or "[k]nowingly

uses * * * the contents of any wire communication, when he knows or has reason to know that the information was obtained through the [unlawful] interception of a wire communication"); *id.* § 542.418 (providing private right of action).

Neb. Rev. Stat. Ann. § 86-702 (Michie 1995) (making it illegal to "intentionally disclose" or "intentionally use * * * the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic, or oral communication"); *id.* § 86-707.02 (providing private right of action).

Nev. Rev. Stat. Ann. § 200.630 (Michie 1997) ("[A] person shall not disclose the existence, content, substance, purport, effect or meaning of any wire or radio communication to any person unless authorized to do so by either the sender or receiver."); *id.* § 200.690 (providing private right of action).

N.H. Rev. Stat. Ann. § 570-A:2 (1986) (making it illegal to "[w]ilfully disclos[e]" or "[w]ilfully use[] * * * the contents of any telecommunication or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a telecommunication or oral communication"); *id.* § 570-A:11 (providing private right of action).

N.J. Stat. Ann. § 2A:156A-3 (1985 & Supp. 1999) (forbidding any person to "[p]urposely disclose[]" or "[p]urposely use[] * * * the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication"); *id.* § 2A:156A-24 (providing private right of action).

N.M. Stat. Ann. § 30-12-1 (Michie 1994) (prohibiting the "knowing[] * * * reading, interrupting, taking or copying [of] any message, communication or report intended for another by

telegraph or telephone without the consent of a sender or intended recipient thereof"); *id.* § 30-12-11 (providing private right of action).

N.C. Gen. Stat. § 15A-287 (1999) (making it illegal to "[w]illfully disclose[] * * * the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained" unlawfully, or to "[w]illfully use[] * * * the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire or oral communication"); *id.* § 15A-296 (providing private right of action).

N.D. Cent. Code § 12.1-15-02 (1997) (forbidding any person to "[i]ntentionally disclose[] to any other person or intentionally use[] the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication").

Ohio Rev. Code Ann. § 2933.52(A)(3) (Anderson 1996) (criminalizing the "purpose[ful] * * * [u]se[of] the contents of a wire, oral, or electronic communication, knowing or having reason to know that the contents were obtained through the [unlawful] interception of a wire, oral, or electronic communication"); *id.* § 2933.65 (providing private right of action).

Okla. Stat. Ann. tit. 13, § 176.3 (West 1994) (making it illegal to "[w]illfully disclose[]" or "[w]illfully use[] * * * the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained" unlawfully).

Or. Rev. Stat. § 165.540 (1997 & Supp. 1998) ("no person shall * * * [u]se * * * or divulge to others any conversation, telecommunication or radio communication obtained" illegally).

18 Pa. Cons. Stat. Ann. § 5703 (West 2000) (making it illegal to "intentionally disclose[]" or "intentionally use[] * * * the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication"); *id.* § 5725 (providing private right of action).

R.I. Gen. Laws § 11-35-21 (1994 & Supp. 1999) (authorizing imprisonment for any person who "willfully discloses" or "willfully uses * * * the contents of any wire, electronic, or oral communication, knowing, or having reason to know, that the information was obtained through [unlawful] interception of a wire, electronic, or oral communication").

Tenn. Code Ann. § 39-13-601 (1997) ("a person commits an offense who * * * [i]ntentionally discloses" or "[i]ntentionally uses * * * the contents of any wire, oral or electronic communication, knowing or having reason to know, that the information was obtained through the [unlawful] interception of a wire, oral or electronic communication"); *id.* § 39-13-603 (providing private right of action); *see also id.* § 39-13-604(b)(1) ("A person commits an offense who, without the consent of at least one (1) party to a communication, intentionally records or disseminates a communication transmitted between two (2) cellular radio telephones, a cellular radio telephone and a landline telephone, or a cordless telephone and a cellular radio telephone."); *id.* § 39-13-604(b)(2) ("A person commits an offense who intentionally disseminates a communication transmitted between two (2) cordless telephones or a cordless telephone and a landline telephone if such dissemination is not authorized by a court order.").

Tex. Penal Code Ann. § 16.02 (West 2000) ("A person commits an offense if he * * * intentionally discloses * * * the contents of a wire, oral, or electronic communication if he knows or has reason to know the information was obtained through the [unlawful] interception of a wire, oral, or electronic

communication in violation of this subsection," or "intentionally uses * * * the contents of a wire, oral, or electronic communication if he knows or is reckless about whether the information was obtained through the [unlawful] interception of a wire, oral, or electronic communication * * * ."

Utah Code Ann. § 77-23a-4 (1999) (making it illegal to "intentionally or knowingly disclose[]" or "intentionally or knowingly use[] * * * the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic, or oral communication"); *id.* § 77-23a-11 (providing private right of action).

Va. Code Ann. § 19.2-62 (Michie 1995) (making it illegal to "[i]ntentionally disclose[]" or "[i]ntentionally use[] * * * the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication"); *id.* § 19.2-69 (providing private right of action).

W.Va. Code § 62-1D-3 (1997) (forbidding any person to "[i]ntentionally use or disclose * * * the contents of any wire, oral or electronic communication or the identity of any party thereto, knowing or having reason to know that such information was obtained through the [unlawful] interception of a wire, oral or electronic communication"); *id.* § 62-1D-12 (providing private right of action).

Wis. Stat. Ann. § 968.31(1) (1998) (making it illegal to "[d]isclose[]" or "[u]se * * * the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the [unlawful] interception of a wire, electronic or oral communication"); *id.* § 968.31(2m) (providing private right of action).

Wyo. Stat. Ann. § 7-3-602 (Michie 1995 & Supp. 1999) ("no person shall willfully * * * [d]isclose" or "[u]se the contents of any wire, oral or electronic communication knowing or having

reason to know that the information was obtained through the [unlawful] interception of a wire, oral or electronic communication"); *id.* § 7-3-609 (providing private right of action).

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT JACK YOCUM

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October 25, 2000

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QUESTION PRESENTED

Whether, consistent with the First Amendment, a person who violated no laws and was wholly innocent in receiving the contents of a communication nonetheless may be held liable under 18 U.S.C. § 2511(1)(c) and its Pennsylvania analog for truthfully redisclosing the contents of that communication merely because he knows or has reason to know that the initial anonymous source may have acted unlawfully in obtaining the contents of that communication?

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BRIEF FOR RESPONDENT JACK YOCUM

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 200 F.3d 109. The opinions and orders of the district court (Pet. App. 59a-76a) are unreported.

JURISDICTION

Jurisdiction is as stated in the petitioners' briefs.

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and select portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.*, are reproduced in the appendix to the Brief for the United States. U.S. Br. 1a-10a. Select portions of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5701 *et seq.*, are reproduced in the Brief for Petitioners Bartnicki and Kane. Bartnicki Br. 3-4.

STATEMENT

This case originated when respondent Jack Yocum found in his mailbox an audio tape, dropped off by an unknown person.[1] Yocum played the tape, on which senior representatives of a local teachers' union, petitioners Bartnicki and Kane, were heard having a conversation. Bartnicki states that she is on a cellular phone. Yocum recognized their voices because he was a leader of a loosely organized group of residents opposed to certain of the teachers' salary demands.

On the tape, Bartnicki and Kane discuss a number of issues relating to ongoing negotiations (referring, for example,

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[1] The Solicitor General's assertion that it was necessarily the intercepting party who provided the tape to Yocum, U.S. Br. 7, is not supported by the record. No one knows who gave the tape to Yocum. JA 53. Accord Bartnicki Br. 5.

to certain school board representatives as "nitwits," JA 47). Discussing the size of a salary proposal anticipated from the board, Kane then states: "If they're not gonna move for three percent, we're gonna have to go to their, their homes. . . To blow off their front porches, we'll have to do some work on some of those guys." *Id.* 46.[2]

The next day, Yocum delivered the tape to a local radio talk show host, respondent Vopper, who made a copy. Yocum, who had himself been the subject of threats relating to the union negotiations, JA 110-13, provided the tape out of concern for the safety of school board members and their families, *id.* 36, 54, 120, believing that the police would not take action because no violence had yet occurred, *id.* 54. See also *id.* 118 ("I could not morally live with the fact that what if this did happen, if I did nothing."). Yocum also disclosed the tape to certain school board members and one other reporter. Other members of the media came into possession of the tape as well, JA 100, quite possibly from some other source.

Several months after Yocum first disclosed the tape to Vopper, the union largely prevailed on its salary demands in nonbinding arbitration. *Id.* 81-82, 105-06. At that point, and over the subsequent weeks, Vopper played all or part of the tape on the radio in the context of discussing the labor situation in the school district.

Since well before the arbitral ruling, the school board negotiations "were markedly contentious, generated significant public interest and were frequently covered by the news media." No. 99-1728, Pet. App. ("Pet. App.") 2a.[3] After Vopper

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[2] Ironically, although petitioners strongly protest in this case that privacy is inviolate, on the tape they discuss confidential information apparently leaked from the school board's negotiators. JA 43.

[3] See also JA 79 (Petitioner Kane, in response to the question "Would it be fair to say that this is a labor dispute that got a lot of media attention?": "Yes, I would say yes. Very much so."); *id.* 92 (petitioner Kane, in response to the question "[W]ould it be fair to characterize it as a very contentious negotiation that was still going on between the district and the union?": "Yes, yes."); *id.* 126 (deposition of television news anchor: "Well, I knew the story; it was a big story going on. It was controversy. It was, you know, a newsworthy story at the time, that this school district was trying to–the schoolteachers were trying to get a raise, and the school board was not giving in. So it was a big story at the time.").

played the tape, a number of television stations and newspapers either played excerpts or reported transcripts of the conversation, treating both the statements and the fact that they had been disclosed as important news stories. JA 85-86 (there were "several days of stories concerning [the tape] in the newspapers" and "on the television stations"); *id.* 156. For its part, the union, through its representatives, actively and successfully presented its views in the press, including the view that Kane's statement about "blow[ing] off their front porches" was simple hyperbole. *Id.* 80, 82, 91, 95-97, 132, 135, 141.

Petitioners Bartnicki and Kane also sued Vopper and entities related to the radio station under the federal and Pennsylvania wiretapping statutes. JA 12-18 (complaint). When discovery proceedings revealed that Yocum had provided the tape to Vopper, they amended their complaint to name Yocum as a defendant as well. *Id.* 24-30. They also held out the possibility of suing the other media outlets that had disclosed the contents of the tape. JA 133 (petitioner Kane holding out the possibility of suing "WDAU, Channel 22," "Channel 16," "the *Citizens' Voice*," and "the *Times Leader*").

Bartnicki and Kane specifically alleged that Respondent Yocum "intentionally disclosed the tape to several individuals and media sources including but not limited to, [Vopper]." JA 26-27.[4] They also alleged that Yocum "knew or had rea-

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[4] Although petitioners state that the complaint alleged that Yocum had "used" the tape, U.S. Br. 7, Bartnicki Br. 9, that is not correct: the only act attributed to respondent Yocum was that he had "disclosed the tape," JA 26-27. See also Pet. App. 20a, 21a n.2. Petitioners, on the pages of the

son to know that the private telephone conversation between Bartnicki and Kane was obtained surreptitiously through the illegal interception of their telephone conversation." *Id.* 27 (capitalization omitted). (The complaint does not allege how the interception occurred and, indeed, it is not known to this day how the conversation was recorded.[5]) Petitioners asserted claims for statutory, compensatory, and punitive damages, as well as attorney's fees and litigation costs. *Id.* 28, 30.

Petitioners specifically asserted a claim under a provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended, 18 U.S.C. § 2510 *et seq.* ("Title III"), and a parallel Pennsylvania wiretapping statute, 18 Pa. Cons. Stat. § 5701 *et seq.* The relevant provisions of the federal statute subject to criminal liability, and create a private right of action against, "any person who * * * intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. §§ 2511(1)(c), 2520. By its terms, the statute thus prohibits not only disclosure of the contents of the communication by the person who intercepted the communication, but also *re*disclosure of those contents by any other person indefinitely into the future. (Hereinafter, for ease of reference, we refer to the state and federal provisions collectively as "the redisclosure prohibition.").

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complaint they cite, merely quoted all of the prohibitions of the state and federal wiretapping acts. JA 27-28, 29-30.

[5] The assertion that the conversation was recorded with the use of a scanner that intercepted the radio component of Bartnicki's cell phone, see Bartnicki Br. 5, is not established by the record. It is possible that a wiretapping device was installed on Kane's phone or that Kane was using a cordless telephone. Petitioners' complaint encompasses all of these possibilities. JA 26.

Under the federal wiretapping act, conventional and cellular telephone calls are defined as "wire communications." 18 U.S.C. § 2510(1). The "contents" of such communications are defined broadly to "include[] any information concerning the substance, purport, or meaning of that communication." *Id.* § 2510(8).

The district court refused to dismiss the complaint on First Amendment grounds, but certified the case to the Third Circuit, which reversed. Pet. App. 42a. The court of appeals explained that the question before it was whether "the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants * * * played no direct or indirect role in the interception." *Id.* 2a. The court concluded that although the wiretapping act was in large part enacted to protect privacy, a content-based interest that triggers strict scrutiny, *id.* 25a-27a, it should be evaluated instead under intermediate scrutiny because of the government's asserted content-neutral interest in reducing the number of illegal interceptions, *id.* 27a-28a.

Applying intermediate scrutiny, the court of appeals held that the *re*disclosure prohibition could not constitutionally be applied in the circumstances of this case. The court explained that petitioners had totally failed to establish that a ban on redisclosure would reduce the number of interceptions:

> The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis

for us to conclude that these provisions have deterred any other would-be interceptors.

Pet. App. 33a-34a. The court explained that this wholly speculative benefit was insufficient to justify a prohibition on important speech:

> The public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance.

Id. 36a-37a.

This Court subsequently granted and consolidated petitions for certiorari by the plaintiffs and by the United States.

SUMMARY OF ARGUMENT

1. Prohibiting a wholly innocent speaker from redisclosing truthful information on a matter of central public concern, merely because the initial interception and disclosure of such information may have been due to the wrongdoing of an unrelated third party, violates the First Amendment and cannot survive even intermediate constitutional scrutiny.

a. Banning the redisclosure of the contents of unlawfully intercepted communications or information derived therefrom does not substantially further any government interest in reducing the number of illegal interceptions by unrelated third parties. The raw speculation that there exists a "market" for the redisclosed contents of intercepted communications has no basis in the evidence that was before Congress or in any

findings made by Congress. Petitioners also fail to establish that any hypothetical "market" for intercepted communications is not adequately addressed by the nonspeech restrictions on intercepting communications or procuring such intercepts, or by technological developments, such as digital cellular and cordless phones, that have minimized the ability to intercept communications at all. Furthermore, any supposed need for the ban on redisclosure to reduce the number of interceptions is belied by the *absence* of such a ban in other provisions of federal law relating to the unauthorized release of far more sensitive materials, including national security information.

Even assuming the hypothetical "market" for intercepted communications existed, the redisclosure ban would not effectively serve the claimed interest in reducing the number of interceptions. The ban on redisclosure could only conceivably affect targeted interceptions driven by nonmonetary demand and performed by anonymous and risk-taking persons already willing to illegally intercept communications.

The analogies petitioners draw to stolen mail, child pornography, and stolen property all fail. There is no law prohibiting the disclosure or redisclosure of stolen mail. Conversely, while it is illegal to possess stolen mail, it is not illegal to receive or possess intercepted communications. It is likewise illegal even to possess child pornography, and in that case there is actual evidence of an economic market for such materials. The information in this case is also of core First Amendment value, unlike child pornography. The existence of a market for stolen property is also well established and economically driven, unlike the speculative market for redisclosed intercepts.

b. Any other claimed interests arising from the redisclosure of intercepted communications are based on the communicative impact of such disclosures and hence independently cause the redisclosure ban to fail. Furthermore, the ban on redisclosure is substantially overbroad in relation to the al-

leged privacy interests, as it applies in many instances regardless of any reasonable expectation of or concern for privacy on the part of the intercepted party. The claimed interest in promoting use and development of new communications technology is also driven by concerns over the communicative impact of disclosures and the reactions of persons to such disclosures. Furthermore, the statute is not remotely tailored to such an interest, in fact providing *lower* penalties where interception targets the supposedly new technologies being protected. Finally, any interest in promoting certain types of private speech and avoiding a supposed chill from private rather than government conduct is itself offensive under the First Amendment, does not incorporate protection for First Amendment rights as does the "fair use" doctrine in the copyright context, and is surely not of a constitutional magnitude.

c. Whatever incidental and poorly served benefits might be attributed to the ban on redisclosure, the ban's substantial direct restriction on speech of the highest First Amendment value and its indirect chill on a broad array of protected speech that does not cause any cognizable harm more than outweigh the government interests for purposes of intermediate scrutiny. Indeed, the very nature of the redisclosures targeted by the ban virtually guarantees that the speech directly and indirectly affected will be information of public significance. And because the ban applies not just to the verbatim communication itself, but even to facts abstracted from that communication, and because of its imprecise and broad wording, the sweep of the chill in discussion of public matters will be tremendous. It is not for this Court to adopt the numerous amendments proposed by petitioners in an attempt to narrow the plain breadth of the statute's terms. Rather, such narrowing determinations are for Congress, and it is not at all clear that Congress would reenact even a narrower ban on redisclosure, particularly in light of recent legislative decisions rejecting such bans in other, more serious, contexts.

2. Alternatively, the redisclosure ban should be invalidated under strict scrutiny as a direct and content-based restriction on truthful speech addressing matters of public import by a person having engaged in no underlying wrongdoing. There is no credible claim that the ban can survive strict scrutiny.

a. Under this Court's decisions in *Smith* v. *Daily Mail Publishing Company*, 443 U.S. 97 (1979), and *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), the redisclosure provision is subject to strict scrutiny because, regardless of any upstream wrongdoing by intercepting parties, respondents' receipt and possession of the information in question were entirely lawful, and hence the truthful redisclosure of that information is fully protected. This case is thus indistinguishable from *Florida Star*, in which the initial release of the information to the media was wrongful on the part of the government, but the media's receipt of that information was lawful. This case thus does not present the question whether a person who obtains information through his own wrongdoing may be prohibited from disclosing that information.

b. Even aside from the *Daily Mail* principle, strict scrutiny applies because the redisclosure ban is a direct prohibition on protected speech. The burden on speech in this case is neither an incidental effect of a regulation on nonspeech conduct nor a regulation of the time, place, and manner of speech. Rather, it results from a direct and targeted suppression of the "disclosure" of the contents of certain communications – an inherently and exclusively communicative act. The redisclosure ban thus targets pure speech and necessarily has as its purpose the suppression of free expression.

c. The redisclosure ban is also subject to strict scrutiny because it is both content based and justified by reference to the communicative impact of redisclosures. The statute itself expressly prohibits the disclosure of the "contents" of an intercepted communication, and thus can only be applied by examining the content of both the challenged speech and the

allegedly intercepted communication. In addition, much of the justification for the ban turns on the communicative impact of the redisclosure on both the listeners and the parties to the intercepted communication. Indeed, petitioners repeatedly note that the specific and unique justification for the redisclosure prohibition, separate from the ban on interception itself, is the compounding effect of each further communication of the intercepted information. Finally, the redisclosure ban is prone to both content- and viewpoint-based enforcement and is in fact being enforced in this case in a viewpoint-discriminatory manner. Although many media outlets redisclosed the intercepted communication, petitioners only sued the limited media respondents in this case because of disagreement with their past speech. And although numerous individuals discussed, and hence disclosed, the contents of the intercepted communication, the only nonmedia individual sued was respondent Yocum, a political opponent of the teachers' union.

There being multiple grounds for applying strict scrutiny and no colorable claim that the redisclosure ban satisfies such scrutiny, the challenged law violates the First Amendment.

ARGUMENT

I. THE BAN ON REDISCLOSURE FAILS EVEN INTERMEDIATE SCRUTINY.

The Court need not in this case determine the degree of scrutiny applicable to the redisclosure provision of Title III, because under the most lenient standard advanced by petitioners – intermediate scrutiny – the statute is invalid. A statute will survive intermediate scrutiny only if "it furthers an important or substantial governmental interest" that "is unrelated to the suppression of free expression" and any restriction of "First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). The redisclosure prohibition fails on every count: it accomplishes essentially nothing; any benefits it might secure come at the direct expense of free speech; and it prohibits and chills vastly more protected speech than necessary to accomplish the interests asserted by petitioners.

A. The Ban on Redisclosure Does Not Substantially Further A Governmental Interest in Reducing The Number of Illegal Interceptions.

Petitioners assert that the redisclosure ban reduces the number of illegal interceptions by eliminating "the 'market' for illegally intercepted communications." U.S. Br. 14. Without such a prohibition, petitioners argue, there will be an incentive to engage in interceptions, the contents of which could later be "laundered" through third parties. But there is no such "market" for intercepted communications, and the redisclosure prohibition could not have any substantial effect on such a "market" if it did exist.

1. ***The ban on redisclosure is not necessary to eliminate a "market" for intercepted communications.*** Petitioners are not correct that the ban on redisclosure is necessary to eliminate a "market" for the redisclosed contents of intercepted communications. First and foremost, petitioners' briefs invent such a "market" out of whole cloth. Congress enacted Title III, including the disclosure provision, 18 U.S.C. § 2511(1)(c), in 1968. Not only did Congress and the President's Commission on Law Enforcement and Administration of Justice fail to make any findings that such a market existed, but they did not hear testimony confirming or even suggesting the potential for such a market to arise. Similarly, when Congress extended the statute to cover electronic communications in 1986, it did not receive any evidence or make any findings to that effect. If redisclosure were a realistic problem, Congress would have taken testimony, including from the executive branch, that the prohibition was necessary in order to prevent circumvention of the underlying ban on interception. But it heard no such testimony and made no such finding.

The testimony quoted by petitioners (U.S. Br. 36 & n.11; Bartnicki Br. 27-33) relates only to the fact that cellular calls were being *intercepted*, not that the interceptions were being disclosed by anyone other than the person who conducted the initial interception.

The absence of any pressing need for the redisclosure ban in the circumstances of this case is confirmed by petitioners' continuing inability to adduce any evidence to establish, even post hoc, that absent the ban on redisclosure there would be a "market" for intercepted communications or that interceptions would otherwise be "laundered" through third parties. Nor have the plaintiffs in the two other recent related cases made any such showing. See generally *Peavy* v. *WFAA-TV*, 221 F.3d 158 (CA5 2000); *Boehner* v. *McDermott*, 191 F.3d 463 (CADC 1999), *pet. for cert. pending*, No. 99-1709. Petitioners' repeated reliance on a statement by a panel of the D.C. Circuit in the *Boehner* case that the redisclosure provision prevents criminals from "literally launder[ing] illegally intercepted information," 191 F.3d at 471, is nothing more than bootstrapping: the panel majority in that case simply accepted the identical unsupported assertions that petitioners now repeat in this Court. The Third Circuit thus was quite right in concluding in this case that petitioners' claims regarding the existence of a "market" for intercepted communications are nothing more than "*ipse dixit*" and an "unsupported allegation that the statute is likely to produce the hypothesized effect." Pet. App. 33a-34a.

Petitioners' plaint (*e.g.*, U.S. Br. 41) that it would not be fair or realistic to require support in the record would, if accepted, represent a serious retreat from this Court's uniform insistence that speech restrictions be justified by actual evidence, not by speculation and strained hypothesis invented by the counsel to self-interested litigants. The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (citation omitted); see also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined.").

Petitioners also fail to establish why such a hypothetical "market" for intercepted communications would not be addressed sufficiently by the other stringent provisions of Title III. A "market" contemplates the existence of "demand," but an unchallenged provision of the statute directly targets any genuine demand by making it illegal to "procure[] any other person to intercept or endeavor to intercept" a communication. 18 U.S.C. § 2511(1)(a). That same provision also targets any "supply" of intercepted communications, establishing criminal fines, jail sentences, and civil liability for the act of interception and for any disclosure *by the intercepting party*. *Id.* Any supposed supply of intercepted communications is further addressed by a provision targeting the means of interception: criminalizing the manufacture, sale, possession, or even advertising of equipment that is "primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications." *Id.* § 2512(1). Violators face substantial fines and jail terms, as well as statutory, compensatory, and punitive damages. *Id.* §§ 2511, 2520.

Furthermore, private parties are themselves actively addressing the issue of intercepted communications. For example, petitioners' concern in this case apparently arises from the ability to intercept, without detection, the radio component of analog cellular and cordless telephone calls. But the market for digital cellular phones, which cannot be intercepted in that fashion,[6] is booming and is destined to supplant

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[6] See Jeffrey Silva, *Congress Finds Everyone Has Their Own Ideas on Eavesdropping*, RADIO COMM. REP., Feb. 10, 1997, at 10 ("Jay Kitchen, president of the Personal Communications Industry Association, said the

the earlier generation of analog phones.[7] Similarly, the current generation of cordless telephones employs systems of scrambling and shifting channels that are far more difficult to intercept.[8] In addition to curtailing any supposed supply of intercepted communications, those technological developments contradict petitioners' claim that the redisclosure prohibition is needed for innovation or use of new communications technologies.

Finally, petitioners' insistence that the redisclosure prohibition is needed in order to prevent the "laundering" of illegal intercepts is belied by other provisions of federal law. For example, the redisclosure of even sensitive national security information does not give rise to criminal or civil liability. Of

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new digital personal communications services will solve the [eavesdropping] problem because the next-generation pocket phones are more secure than analog cellular phones."); David Hess, *House Votes to Outlaw Eavesdropping on Cellular-Phone Calls*, KNIGHT-RIDDER/TRIB. NEWS SERV., Mar. 5, 1998 ("Digital PCS phones already have a built-in safeguard against eavesdropping, because they transmit calls as encrypted computer data. Anyone using a scanner to listen to a digital call would hear only noise."); William Glanz, *Wireless-Phone Wars Could Grow If MCI Enters Fray*, WASH. TIMES, Apr. 7, 1999, at B8 (explaining that transmissions by digital phones "are more secure" because "[w]hile analog technology transmits straight voice signals, digital technology translates them into the binary code of ones and zeroes and transmits that").

[7] See Stefanie Scott, *Wireless Service Providers Compete for Appleton, Wis.-Area Cell Phone Users*, POST-CRESCENT, Oct. 3, 2000 (indicating that "about 50 percent of [mobile phone] users have digital phones, with the number growing rapidly" and that "[a] few analog phones still exist, but most users upgrade their phone every year to three years and only digital upgrades are available"); Glanz, *supra* (noting (in April 1999) that "[w]ireless customers are increasingly choosing digital over analog phones. Of the 69.2 million subscribers on Dec. 31 [1998], 18.3 million – or 27.8 percent – were digital phone users. That's up 183 percent from 6.4 million digital subscribers last year.").

[8] *E.g.*, Steven S. Woo, *Cordless But Still Connected*, DES MOINES REG., Apr. 25, 2000 (noting that "[d]igital cordless phones are more secure" than analog cordless phones because "[t]hey constantly shift and scramble the signal to deter eavesdroppers").

particular note, after apparently giving considerable attention to the First Amendment's requirements, Congress this year passed (and the President is expected to sign) a bill, H.R. 4392, that for the first time broadly criminalizes leaks of classified information but that notably does *not* include a ban on redisclosure. See generally Vernon Loeb, *Anti-Leak Bill Alarms Media, Divides GOP*, WASH. POST, Oct. 24, 2000, at A2. Although such unauthorized disclosures are of far greater concern than the generic communications covered by Title III, the Department of Justice nonetheless opposed extending the statute further *on First Amendment grounds*. See *Reno: Leak Law Should Not Be Used Against Media*, UNITED PRESS INT'L, June 15, 2000 ("Attorney General Janet Reno Thursday said any federal law making leaks of classified information to the news media a felony should not be used against reporters. * * * [S]he said she doesn't oppose leak legislation 'that will be useful,' but 'I think everyone wants to focus on appropriate First Amendment concerns.'"); see also Transcript of Attorney General Reno's June 15, 2000 News Briefing, *available from* FDCH POLITICAL TRANSCRIPTS (stating, *inter alia*, "[W]e have to address how you walk the line between a free press able to publish and encourage public debate and how we protect the national security of this country").

Indeed, the redisclosure prohibition of Title III stands basically alone in American law, such that Congress has not seen the necessity to enact parallel measures in the innumerable areas in which confidential information may fall into the hands of the media or other private parties. The closest analog identified by the Solicitor General, U.S. Br. 6, is a statute prohibiting the use or disclosure of information obtained as a result of national security intelligence measures. 50 U.S.C. § 1809. But liability under that statute is much narrower than under Title III. The defendant must know or have reason to know that the interception was conducted "under color of law" without authorization under the statute's detailed proce-

dures, as well as that the parties to the intercepted communication had "a reasonable expectation of privacy [such that] a warrant would be required for law enforcement purposes." *Id.* §§ 1809(a)(2), 1801(f).

2. *The ban on redisclosure cannot effectively reduce the number of interceptions.* Even if the "market" for intercepted communications imagined by petitioners and never identified by Congress existed, it would be exceedingly limited in scope, unlike any *actual* "market," and devoid of any realistic class of suppliers or consumers. Extinguishing any such "market" could not possibly justify the scope of the ban on redisclosure or outweigh its severe burden on protected speech.

First, petitioners' reduced-demand theory imagines a "market" consisting of interceptions targeted at specific persons. In particular, petitioners do not maintain that the ban on redisclosure will deter persons who intercept analog cellular calls by listening to radio scanners out of simple "nosiness." Those persons no doubt will continue to engage in that conduct for their own personal gratification regardless whether they can later provide the contents of an interception to a third party for redisclosure.

Any remaining number of "targeted interceptions" is very small because they are exceedingly difficult to conduct. The record evidence in this case establishes that it is quite unlikely that someone could "target" a particular cellular conversation because analog cellular calls can be carried on any of a number of different channels, which themselves shift in the middle of a call as the phone moves between "cells." JA 159-62. And, as noted, it is far more difficult still – if not impossible – to intercept a digital cellular phone call.

Second, petitioners' claimed need to attack the demand for information imagines a "market" supplied by totally anonymous, risk-taking intercepting parties. That is so because a person supplying a "market" for public disclosures

cannot be confident of maintaining anonymity. Any contact between the interceptor and the recipient of an intercepted communication creates an evidentiary trail that will lead back to the original interception. It thus simply is not true that the ban on redisclosure is necessary to prevent someone from "laundering" an interception by giving it to a friend or family member.

In the *Boehner* case, for example, the plaintiffs were easily able to identify the couple who intercepted the original cell phone call. Similarly, in this case, the plaintiffs identified respondent Yocum by taking discovery from the media respondents. They then deposed respondent Yocum and questioned him extensively regarding who might have given him the intercepted communication, and who would have had an incentive or the technology to intercept the call. The government, of course, has access to its even greater criminal investigatory powers. Even "anonymous" interceptors cannot be sure that they would be safe, not only because they may be the natural target of suspicion, but also because they may leave a trail of physical evidence, including fingerprints, on the materials they disclose.

Third, any supposed market impact from prohibiting redisclosure must further imagine that the anonymous, risk-taking interceptors are also totally magnanimous. As noted *supra* at 13, the statute separately prohibits any person from soliciting an illegal interception. And both the attempt to arrange some financial exchange and the exchange itself would also create evidentiary trails leading back to the initial, illegal interception. This case, moreover, presents only the question whether the redisclosure prohibition constitutionally may be applied to a party who played "no direct or indirect role in the interception," including by *encouraging* the interception. Pet. App. 2a. To the extent that Congress enacted the redisclosure provision in an effort to prevent economically motivated interceptions, the redisclosure provision is unnecessary and that

interest is not furthered by applying it in circumstances such as this case.

Fourth, petitioners' market theory imagines interceptions conducted only with the intent that they be disclosed broadly on a *secondary* market. But an intercepting party can always provide the contents of an interception directly to a specific group of people without exposing the recipients to liability. Title III (unlike laws involving the mails, stolen property, and child pornography, discussed *infra* at 19-23) does not criminalize the *receipt* or *possession* of an unlawfully intercepted communication. Thus, a person who seeks to embarrass a neighbor or to use intercepted information for commercial advantage can simply distribute or make use of the information himself. Furthermore, a person committed to distributing an unlawful interception broadly can himself use primary rather than secondary outlets, including distributing the contents of the interception anonymously through the Internet, without the need to provide the interception to a third party who would then *re*disclose it.

Recognizing that the redisclosure provision necessarily targets the secondary market for information has two other important consequences. The ban on redisclosure generally would target communications by the media, who are the most common vehicle for broadly distributing information. But the media "buyers" hit by the redisclosure provision are hardly natural or frequent consumers of the *anonymous* intercepts that supposedly create the need for demand-reducing penalties on speech. For example, a news outlet will not have any way of confirming the authenticity of a tape recording without the ability to speak to the anonymous intercepting party and will be disinclined to broadcast it for that reason. In addition, the anonymous intercepting party cannot have any confidence (given that the matter will be out of his control) that further disclosure will actually occur if he does provide the contents of the interception to a third party, thereby mini-

mizing the incentive to take the risk of even engaging in the illegal interception in the first place.

Fifth and finally, the supposed need for banning downstream "demand" imagines a "market" supplied by only intercepts of analog cellular and cordless communications, which petitioners assert are very difficult to stop directly because (unlike the physical intrusion required to install a wiretap or "bugging" device) they can be conducted remotely (as with a radio scanner). But this rationale fails to justify banning the redisclosure of the contents of other communications, including particularly conventional telephones, a point relevant here because it is not certain that the cellular component of the call was intercepted in this case. See *supra* at 4 n.5.

Ultimately, then, petitioners have it precisely backwards in invoking this Court's statement that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 906 (2000). Unlike the question of campaign finance regulation at issue in *Nixon*, the redisclosure prohibition of Title III rests on novel and implausible assumptions unsupported by any legislative record, premises not followed in other provisions of federal law, and highly questionable leaps of logic. Hence, contrary to petitioners' wishful thinking that "*no* such evidentiary showing is required" in this case, U.S. Br. 41 (emphasis added), the "quantum of empirical evidence needed to" justify the ban on redisclosure must "vary *up*" in order to pass muster under the First Amendment.

3. ***The analogies offered by petitioners are not persuasive.*** Petitioners point to three areas – theft of the mails, child pornography, and stolen property – in which they maintain that legislatures or this Court have determined that a ban on the subsequent possession or use of an item will deter some primary illegality. But the legal regimes in those other areas are not in fact analogous and, in any event, they cannot estab-

lish the premise of petitioners' argument: that there is a "market" for intercepted communications that must be deterred. Nor do the examples offered by petitioners address the critical question whether the ban on redisclosure prohibits and chills protected speech.

Petitioners first draw a parallel to the protection afforded the contents of the U.S. mails, arguing that Congress intended that when individuals engage in wire, oral, or electronic communications, "those channels will be as secure as the mails," U.S. Br. 14, because electronic communications are "the modern equivalents of letters," *id.* 37. That analogy is bizarre. The mail theft statutes – unlike the wiretapping statutes – contain no analogous prohibition on *disclosing* the contents of stolen mail. See 18 U.S.C. §§ 1702, 1708. Thus, if respondent Yocum had received a copy of a letter stolen from the mails in which petitioner Kane had raised the possibility of "blowing the porches off" of the homes of school board members, he lawfully could have disclosed that letter.[9] Conversely, Title III, unlike the mail theft statutes, does not criminalize the mere receipt or possession of an intercepted communication.[10]

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[9] The Solicitor General asserts that greater protection is required in the context of illegal interceptions than the mails, because the latter can be stolen only with "the physical access that ordinarily permits prevention and detection." U.S. Br. 37. Not only did Congress make no such finding, but that argument makes no sense of Title III, which imposes *higher* penalties for interceptions performed through physical wiretaps and bugging devices than by remote electronic interceptions. See *infra* at 27.

[10] Even if the mail theft statutes prohibited disclosure of stolen mail, they would not carry the same risk of chilling protected speech. The wiretapping statutes apply to anyone with "reason to know" that the communications were unlawfully intercepted, but the mail theft statutes apply only to someone who actually *knows* that the mail at issue has been stolen. See 18 U.S.C. § 1708; *United States* v. *Bright*, 517 F.2d 584, 587 (CA2 1975). The mail theft statutes also provide only a criminal cause of action; they do not permit the subject of a media report based on stolen letters to bring a civil claim such as the one in this case. See 18 U.S.C. § 1702 (providing for fines and/or jail sentence not to exceed five years); *id.* § 1708 (same).

Petitioners next compare the ban on redisclosure to prohibitions on the receipt, possession, and distribution of child pornography, noting this Court's recognition that such provisions would help to eliminate the "market" for such materials. See *Osborne* v. *Ohio*, 495 U.S. 103 (1990); *New York* v. *Ferber*, 458 U.S. 747 (1982). That analogy is not apt because evidence in those cases established that there was an actual "market" for child pornography. See *Osborne*, 495 U.S. at 110 ("According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground * * * ."); *Ferber*, 458 U.S. at 760 ("While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material * * * ."). The actual and "visible" market for child pornography contrasts sharply with the total absence of any evidence regarding a market for redisclosure of illegally intercepted communications. Similarly, although this Court noted in *Ferber* that economic reasons underlie the creation and distribution of child pornography,[11] separate provisions of Title III address any economic motivations for the illegal interception of communications. See *supra* at 13.

Furthermore, *Ferber* and *Osborne* presented cases in which the speech at issue – child pornography – was acknowledged to have little or no First Amendment value. See *Ferber*, 458 U.S. at 762 ("The value of permitting live per-

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[11] See 458 U.S. at 749 n.1 ("'Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.'" (quoting S. REP. NO. 95-438, at 5 (1977)); *id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials * * * .").

formances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."). And the child pornography statutes were unlikely to chill protected speech because the conduct prohibited (as well as the content of child pornography itself) was clearly defined. See *Osborne*, 495 U.S. at 116 ("That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration."); *Ferber*, 458 U.S. at 751 (statute prohibited knowing "produc[tion], direct[ion] or promot[ion] [of] any performance which includes sexual conduct by a child less than sixteen years of age"). The speech encompassed by Title III's redisclosure provision, by contrast, is itself of the highest value and lacks any such clear delineation from speech not implicating the statute's alleged concerns.

Finally, the child pornography statutes in *Ferber* and *Osborne* sought not only to prevent the initial creation of child pornography, but also to effect the destruction of existing child pornography by criminalizing its possession and viewing. See *Osborne*, 495 U.S. at 111 ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. * * * . The State's ban on possession and viewing encourages the possessors of these materials to destroy them. * * * [E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."). In contrast, in the context of Title III, there is no non-content-based interest in destroying or preventing the publication of the already-intercepted communication.

Petitioners finally draw an analogy to statutes prohibiting the receipt, possession, or sale of stolen property. But, as in the case of child pornography, and in contrast with the wiretapping statutes, there is ample evidence of an economically motivated market for stolen goods. Furthermore, as with the stolen mails and child pornography, the *receipt* and *possession* of stolen goods are both prohibited. Furthermore, statutes prohibiting the receipt of stolen goods do not chill protected speech.

Not surprisingly, the most apt analogy is the one that petitioners do *not* draw: that between Title III's ban on redisclosure and the prophylactic exclusionary rule barring use of unconstitutionally obtained evidence. Just as petitioners claim that the redisclosure provision is necessary to remove the incentive to intercept communications, the exclusionary rule removes the incentive to engage in constitutionally infirm criminal investigatory practices. But as this Court has repeatedly confirmed (with the consistent urging of the Solicitor General), application of the rule is limited to circumstances in which it will have a significant deterrent effect, given the rule's significant social costs and the availability of alternative deterrents. *E.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357 (1998) (collecting cases).

Here, the balance of interests counseling against application of the redisclosure provision is far stronger than in the cases in which this Court has declined to extend the exclusionary rule. In the criminal investigatory context, the principal "social cost" of applying the exclusionary rule is its negative effects on the truth-seeking function of the judicial process. By contrast, the "social cost" of Title III's ban on redisclosure is a categorical prohibition that applies to (a) entirely truthful speech (b) on a matter of public interest that is deserving of the highest protection under the First Amendment (c) by a person or media outlet that has not engaged in the conduct that Congress sought to prevent – interception of communications. Moreover, Title III separately targets the illegal interception itself with the strongest possible "alternative deterrent" – criminal punishment – thus limiting the marginal benefit to be gained by forbidding redisclosure.[12]

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[12] Even if petitioners were correct that the interceptor cannot be so deterred because he is anonymous, the "social cost" of the redisclosure pro-

B. The Statute Does Not Further Any Legitimate Governmental Interest Arising From The Negative Effects of The Disclosure of Intercepted Communications.

Petitioners assert that the ban on redisclosure also furthers two closely related interests arising from the impact of the public revelation of intercepted communications: reducing the instances in which private facts become public, and avoiding the sense of "violation" that supposedly occurs when individuals realize that their communications have been intercepted. As extensions of these interests, petitioners assert that confidence in new communications technologies is increased and that individuals will actually engage in more speech. Petitioners' arguments are unavailing. Not only are these interests impermissibly content-based, but the ban on redisclosure, which by its terms applies equally to both public and private matters and to both new and old technologies, is extraordinarily overbroad. Furthermore, the asserted benefit of increasing the amount of communication is not supported by evidence or logic and, unlike the detriment of government-suppressed speech, is not of constitutional magnitude.

1. ***The interests asserted by petitioners are content based.*** We address the degree of judicial scrutiny properly applied to the ban on redisclosure *infra* in Part II, but it is appropriate to pause here and note that the additional interests asserted by petitioners are entirely content based. According to petitioners, the statute targets "the further injury that occurs when illegally intercepted communications are disclosed," U.S. Br. 9-10, and (more hyperbolically) "the shattering impact of a broadcast in our own words," Bartnicki Br. 35-36 (citation omitted). Unquestionably, these are content-based interests that trigger "the most exacting scrutiny" because the statute "suppresses expression out of concern for its likely

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hibition would nonetheless far outweigh any limited beneficial effect that it may have in reducing the number of interceptions.

communicative impact." *United States* v. *Eichman*, 496 U.S. 310, 317-18 (1990).

2. ***The ban on redisclosure does not substantially further an interest in privacy because it is overbroad.*** The justifications asserted by petitioners cannot support the ban on redisclosure under even intermediate scrutiny because the statute is not tailored to further them in any respect. Most obviously, the statute's criminal and civil penalties generally apply no matter whether the parties to the intercepted communication exhibited any expectation of privacy. Although the statute defines a protected *oral* communication as one in which the person "exhibit[ed] an expectation that such communication is not subject to interception under circumstances justifying such expectation," 18 U.S.C. § 2510(2), no such limitation applies with respect to wire and electronic communications, see *id.* § 2510(1) (defining "wire communication"), (12) (defining "electronic communication"). Thus, the criminal sanctions and statutory damages triggered by redisclosure are exactly the same no matter whether the cellular call in question was conducted in the proverbial locked vault or instead on a crowded train overheard by dozens of people. They are also the same no matter whether the disclosure is made to one person in a private conversation or to one hundred million people on network television.[13]

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[13] Of note, it is apparent that the public is aware of the risks that analog cellular calls will be intercepted and therefore do not treat such conversations as particularly private. See J. Scott Orr, *Legal Signals Get Crossed Listening In On Cellular Calls*, STAR TRIB. (Minneapolis, MN), Sept. 14, 1997, at 4D (spokeswoman for Bell Atlantic Mobile indicates that "consumers are not really that concerned about the privacy of their calls, most of which fall into the 'Honey,-I'll-be-a-little-late' category.' 'If you go by what we're hearing from customers, it's not a big problem. * * * People who are concerned about privacy for business reasons or whatever go into the digital phones.'"); *Privacy Hearings Turn Into Propaganda Battle Between PCS and Cellular*, PCS WK., Feb. 12, 1997 ("Tim Ayers, spokesman for the Cellular Telecommunications Industry Association * * * [said that] the vast majority of consumers select mobile communications

Furthermore, as to any category of protected communication – wire, oral, or electronic – the statute does not require that the contents of the communication in fact be private or personal in any respect. The penalties are the same no matter whether the contents of the communication have already been emblazoned on the front page of every newspaper in the country and no matter whether the contents of the call are something as mundane as a grocery list. In this case, for example, petitioners expressly held out the possibility that they would sue all of the local newspapers and television stations that reported on the contents of the intercepted communication after it was repeatedly broadcast by the media respondents; under the statute as written, that was their right. Indeed, it is a criminal violation to redisclose the contents of an intercepted communication even with permission of *both* of the participants. Conversely, the statute is exceedingly underinclusive because it does not prohibit the disclosure of the identical information if learned other than via an unlawful interception, including by an individual who is standing nearby and overhears the identical conversation.

3. *The ban on redisclosure does not substantially further any governmental interest in making communications more secure or in encouraging new technology.* Petitioners fare no better with their assertion that, without regard to

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for safety reasons and are less concerned about privacy."); *id.* (quoting representative of The Strategis Group Inc. as saying that "[l]ess than 10 percent of [of mobile phone] users even care enough about [privacy] to do anything about it"); *Cellular Privacy, 1997: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm.* (1997) (statement of Gary Shapiro, President, Consumer Electronics Manufacturers Association) ("[M]ost cellular telephone users believe their conversations on cellular phones are less secure than corded phones at home. The trade-off between security and cost indicates that most Americans with cellular phones are willing to accept lessened privacy rather than pay a premium for a secure phone. Fewer than one out of four American cellular telephone users would pay a 20 percent premium for a cellular phone which is 100 percent secure.").

whether the contents of any particular intercepted conversation are private, the ban on redisclosure increases confidence in the integrity of cellular communications as a medium, thereby encouraging development of that medium. Here, too, the asserted interest is content based because it rests on the sense of "violation" that arises from the disclosure of one's communication. And, again, the statute is not tailored to further this asserted interest in any respect. It applies to disclosures even to a single person and to all forms of communications without regard to whether they involve "new technologies." Indeed, directly contrary to petitioners' attempted post hoc rationalization of the statutory scheme, the statutory penalties are *lower* when the interception is of a communication made using the "new technologies" to which petitioners advert: analog cellular and cordless telephones. See 18 U.S.C. § 2511(4)(b)(ii) (lower penalties applicable when "the communication is the radio portion of a cellular telephone communication" or "a cordless telephone communication").[14]

Nor can petitioners manufacture an interest of constitutional magnitude by arguing that this case implicates a constitutional "right to be left alone." The First Amendment does not permit the government to suppress speech in even the best-intentioned effort to expand the net amount of communication; it has no role as a speech "equalizer" because the First Amendment is a prohibition on state action, not private conduct. See generally *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).[15] Similarly, this is not a case involving the

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[14] Ironically, it is the concern about the privacy of analog cellular calls that has been a primary impetus for the development of new and superior technologies, particularly digital cellular phones. See *supra* at 13-14.

[15] Nor does the redisclosure prohibition result in a net increase in speech. Persons concerned about the security of analog cellular or cordless telephones will use other means of communication, such as digital cellular and conventional telephones. See *supra* at 26 n.14. Furthermore, increased speech *per se* is not necessarily a positive value under the First Amendment. Quantity and quality may trade off and information over-

"right not to speak": the *government* is not attempting to require private parties to convey messages they oppose. Compare, *e.g.*, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (state may not compel parade organizers to include group imparting message organizers do not wish to convey); *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1 (1986) (state may not compel utility to carry message of consumer group on billing statement).[16]

Indeed, the precedents cited by petitioners strongly support the conclusion that the ban on redisclosure is unconstitutional. In *Harper & Row, Publishers* v. *Nation Enterprises*, 471 U.S. 539 (1985), the Court held that a magazine's publication of excerpts from President Ford's memoirs was not protected "fair use" under the Copyright Act because it would seriously undermine the copyright holder's valuable right of first publication. The Court took care to note that the Act encompassed only the "form of expression and not the ideas expressed," and that the First Amendment protected the "unfettered right to use any factual information revealed" in the copyrighted work. *Id.* at 556, 557 (citations omitted). Importantly, immediately after stating that the freedom of expression includes "the right to refrain from speaking at all," *id.* at 559 (citation omitted), the Court emphasized that it was "*not* suggest[ing] this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to sup-

load may set in, as anyone with e-mail quickly learns. Ultimately, the notion that the *government* might manipulate the speech market to what *it* deems an appropriate level is itself an offense against First Amendment values. And such offense is magnified when the government does so by reducing speech directed primarily to the public on issues of public concern in order to increase the secret speech of those in government and elsewhere whose activities are a subject of public concern.

[16] Any attempted expansion by the Solicitor General of such a "right not to speak" would be in serious tension with his position that private parties can be compelled to subsidize nonideological messages. See generally Pet. for Cert., No. 00-276, *United States* v. *United Foods*.

press facts," *id.* (emphasis added). See also *id.* at 560 (emphasizing "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas").

Not only would the application of Title III in this case extend far beyond the context of copyrighted material, but it manifestly would "suppress facts." The statute categorically prohibits the disclosure of the entire "contents" of an intercepted communication, defined to "include[] *any* information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8) (emphasis added). It thus would make no difference under the statute if respondents in this case, rather than disclosing the tape, had simply revealed the fact that petitioner Kane had stated his intention to damage the homes of school board negotiators.[17]

The *dictum* from other cases cited by petitioners stands only for the unsurprising proposition that privacy encourages private communication. *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998) (attorney-client communications); *Jaffee* v. *Redmond*, 518 U.S. 1 (1996) (psychotherapist-client communications); *United States* v. *Nixon*, 418 U.S. 683 (1974) (executive communications). But it is impossible to take seriously petitioners' suggestion that such an interest, even if given its fullest force, could justify a flat speech prohibition such as Title III's ban on redisclosure. Petitioners apparently believe that the editor of a newspaper can, consistent with the First Amendment, be jailed, fined, and subject to punitive damages for publishing a leaked attorney-client communica-

[17] That the disclosure here included petitioners' particular expression (*i.e.*, the taped conversation) does not reduce First Amendment protections for that disclosure, particularly when petitioners make no claim that the expression was copyrightable, when the disclosures would have been fair use in any event, and when, if anything, the disclosure of the complete expression was actually fairer to petitioners by placing the putative threat in a context that allows the listener to accurately evaluate petitioner Kane's claim to have been engaging in hyperbole.

tion, psychotherapist-client communication, or statement by the President to one of his advisors. Indeed, if the analogy to Title III is fully drawn, such punishment would be constitutional no matter how banal or widely known the subject of the communication. That simply cannot be correct, but it is the natural consequence of accepting petitioners' position.

C. Respondents' Protected Speech Interest Outweighs Any Benefit from The Ban On Redisclosure.

Any incidental benefit from the redisclosure prohibition is far less significant than the statute's substantial speech-prohibiting and speech-inhibiting effects. Title III flatly bans speech on truthful matters of public interest. Moreover, the statute's sweeping, vague provisions chill a still broader array of protected speech for which there is no governmental interest whatsoever in prohibiting. In both respects, the ban on redisclosure infringes not only on the right of the speaker, but also on "the First Amendment interests of speakers and willing listeners," *United States* v. *Playboy Entertainment Group*, 120 S. Ct. 1878, 1887 (2000), to receive important information that already has left the domain of private communications.

1. ***The redisclosure prohibition is a categorical ban on protected speech.*** It is difficult to conceive of a statute that would more broadly ban the dissemination of truthful, factual information of great public interest than the provision in this case. Title III prohibits the "disclosure" (a term that unquestionably encompasses pure speech) of the "contents" of an intercepted communication, which as noted "includes *any* information concerning the substance, purport, or meaning of that communication." 18 U.S.C. §§ 2511(1), 2510(8) (emphasis added). The "contents" are off limits to discussion and debate no matter whether the facts disclosed are already entirely within the public domain and no matter whether they are embarrassing or mundane, indeed no matter whether the parties to the communication approve or even *encourage* the disclosure. Furthermore, the disclosing party may be sued

and criminally charged no matter how far removed from the initial interception, as when a newspaper is the third, fifth, or even tenth party to receive the "contents" and seeks to disclose that information to its readers.

Nor is there any doubt that the contents of a communication that is publicly disclosed by the media frequently will be of paramount public interest. Indeed, the United States frankly acknowledged in its certiorari filings in this case that, "[a]s a practical matter, it is information of public significance that is most likely to be passed from a wiretapper to third parties and, as in this case, to be publicly disclosed." Reply Br. of U.S., No. 99-1728, at 3. The communication at issue in this case involved direct threats of violence in connection with public-sector labor negotiations. The communication at issue in *Boehner* involved the appearance of congressional impropriety. Press reports indicate that the disclosure of interceptions has also prevented crimes, notwithstanding that even disclosure to the *police* is illegal under Title III.[18]

Finally, the ban on speech extends indefinitely into the future and in every possible context. The statute thus creates the virtual antithesis of a reasonable "time, place, or manner" restriction tailored to an important particular interest. One may not speak regarding the contents of an intercepted communication at any time, in any place, or in any manner.

2. ***The redisclosure prohibition chills significant amounts of protected speech.*** Petitioners largely limit their briefs to proffering interests, discussed *supra* at 11-30, that

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[18] See M.E. Kabay, *The Year-In-Review*, INFO. SECURITY, Dec. 1998, at 16 (recounting a 1998 incident in which a New York woman alerted police that she had overheard a wireless telephone conversation in which two men planned an attack on an elderly woman, thereby enabling police to arrest suspects before they could commit crime); Michael Krantz, *Guess Who's Listening*, TIME, Jan. 27, 1997, at 30 (scanner user "overheard some fleeing criminals and alerted the cops to their whereabouts").

supposedly justify the ban on the redisclosure of the contents of intercepted communications. But they largely ignore the still more troubling chilling effect that the statute has on protected speech. For every suppressed piece of information derived from an unlawful interception, Title III will chill the publication and discussion of dozens of other pieces of lawfully revealed truthful information on matters of public importance that, because of doubts about their provenance, will be perceived possibly to fall within the statutory prohibition.

The redisclosure prohibition chills protected speech because, given the statute's application to almost every form of communication and its broad definition of "contents," it potentially applies to any piece of information. For example, any statement reflecting the contents of a private conversation could have been secured from an interception of that oral communication. Equally, any fact about a business could have been secured by intercepting a cellular call or electronic mail message. The possible examples are endless. Nor is the statute even limited to private facts, given that it applies equally to information that is already public.[19]

This point is particularly apparent when Title III is compared with the statutes at issue in the *Daily Mail* line of decisions. Those cases involved prohibitions on the publication of readily identifiable pieces of information – such as the contents of certain public proceedings (*Landmark Communications*), the names of juvenile offenders (*Daily Mail*), and the names of rape victims (*Florida Star*) – that could be identified with relative ease by the media. This Court nonetheless invalidated those statutes in substantial part because of "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful in-

[19] Indeed, a person receiving an unlawful interception will be chilled from publishing or discussing even independently obtained information on the same subject matter for fear of the difficulty of later proving the independent source.

formation." *Florida Star*, 491 U.S. at 535 (quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496 (1975)). An "illegally intercepted communication" subject to Title III can relate to any issue and (unlike stolen mail) will have no identifying physical characteristics. Literally, any fact can be the subject of an illegal interception; discussion of that fact could, in turn, lead to serious criminal and civil liability.

Petitioners argue that the redisclosure prohibition does not chill speech because it applies only when the speaker has "reason to know" that the information in question is the contents of an illegally intercepted communication, a standard that (at least according to the RESTATEMENT (SECOND) OF TORTS) does not create a duty of inquiry. But petitioners' entire line of argument on this point is in tension with their principal contention that the breadth and substantial penalties of the redisclosure provision are necessary to eliminate the "market" for intercepted communications. Title III's chilling effect is simply the other side of the coin of its considerable overdeterrence.[20]

Petitioners' argument also fundamentally misconceives the risks that will cause protected speech to be "chilled." Even if a speaker has substantial confidence that a jury would eventually find that she had no "reason to know" of any illegal interception, it will take an exceptionally confident speaker indeed to risk a *felony conviction*, criminal fines, hard jail time, a civil suit, statutory damages, compensatory damages, and punitive damages. Accord *Reno* v. *ACLU*, 521 U.S. 844, 871-72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvi-

[20] Similarly, petitioners cannot seriously maintain that the stringent criminal and civil sanctions of the redisclosure provision will *not* chill speech while simultaneously insisting with hyperbolic vigor that private conversations will be chilled by the minimal possibility of interception and public disclosure. *E.g.*, U.S. Br. 43 ("[I]t is far more chilling of speech for a person to know that his private expressions may later be reported with impunity to the world at large.").

ous chilling effect on free speech. * * * [In addition, the] severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." (citations omitted)). This concern is substantially heightened by the risk that the subjects of unfavorable news reports or local gossip may bring suits under Title III that ultimately prove meritless, particularly given that the statute does not require the plaintiff to have suffered any injury at all in order to bring suit. The mere potential for a suit, regardless of outcome, creates a threat that will chill much speech that would ultimately have been proven lawful. Petitioners also misconceive the sophistication of the persons potentially subject to liability, as they assume that reporters, editors, and even private citizens will, in deciding whether they should risk going to jail for publishing a particular story or even engaging in a simple conversation, turn a studied eye to their respective copies of the RESTATEMENT (SECOND)'s definition of "reason to know."[21]

Finally, it cannot be overemphasized that the speech chilled by the redisclosure ban not only is truthful and addressed to matters of public importance, but also is categorically protected by the First Amendment in the sense that the government has no direct interest in suppressing it. Indeed,

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[21] A further chilling effect arises from the application to the media of the categorical prohibition on "use" of intercepted communications. Even if the media does not intend to disclose the contents of a particular communication, it may not "use" the information to develop independent sources or to confirm facts. Just as troubling from the perspective of "chilling" speech, reporters must be constantly vigilant to the possibility that a source has provided them with unlawfully intercepted information that cannot then be utilized for any purpose. Any effects of a subsequent story based on that information could give rise to substantial compensatory and punitive damages. Indeed, the only practical effect of the statute's "reason to know" standard would seem to be that, ironically, it discourages the media from exploring the authenticity and provenance of information, for fear that it will be revealed that the information arises from an unlawful interception.

any fair and thorough discussion of the "governmental interests" implicated by this case would recognize that the government in our democratic society has every interest in *encouraging* such speech.

3. ***The chilling effects of the redisclosure ban cannot be avoided by having this Court amend the statute.*** In what can only fairly be described as an implicit concession that the redisclosure provision is unconstitutional as written, petitioners offer a litany of proposed changes to Title III that would in various respects limit its substantive scope and set a higher bar for imposing liability. The most fundamental flaw in this line of argument is that it violates the separation of powers: this Court interprets federal statutes; it does not enact or amend them. (Relatedly, in contrast to much of the Solicitor General's brief, the role of the executive branch is to enforce the law, not to provide this Court with proposed statutes and hypothesized supporting records for those proposals.) When a law violates the First Amendment, "it is for Congress, not this Court, to rewrite the statute." *Blount* v. *Rizzi*, 400 U.S. 410, 419 (1971). The respective roles of the separate branches of government are all the more important in this context, in which judgments must be made based on empirical determinations regarding the existence of supposed "markets" and the degree of deterrence provided by criminal and civil penalties that lie far afield from this Court's expertise. Such concerns are substantially heightened in this case, in which petitioners throw out proposals left and right, none with anything more than a *single sentence* of discussion.

Furthermore, there now exists the very gravest doubt that Congress would enact Title III's redisclosure prohibition at all, much less a provision reflecting petitioners' various amendments. The redisclosure prohibition was enacted in 1968, a *decade* before this Court articulated what has come to be known as "the *Daily Mail* principle": that when "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitution-

ally punish publication of the information, absent a need to further a state interest of the highest order." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)[22] More recently, Congress has not adopted such redisclosure prohibitions even as to exceedingly sensitive information. See *supra* at 14-15 (discussing, *inter alia*, recently passed bill regarding leaks of classified information).[23]

It therefore is noteworthy that there are a host of proposals to better enforce Title III's underlying prohibition on interception that, because they do not raise the same degree of First Amendment concern, Congress would be far more likely to adopt than those floated by petitioners. As the Third Circuit explained, Pet. App. 35a, the federal government and the states could more actively enforce their existing criminal prohibitions on interceptions. Or they could potentially enact prohibitions on the receipt and possession of unlawfully intercepted communications, which are conspicuously missing from current wiretapping laws. The government could also fund the development of communications technologies that could not be easily intercepted. Indeed, if the problem of interceptions were serious enough, the government could *require* the use of such technologies.

Petitioners do not even attempt to argue that any of their alternative proposals would do anything other than change the statute as written. This is accordingly not a case in which "a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Thus, petitioners cannot seri-

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[22] There is every indication that even when Congress amended Title III in 1986, it was not cognizant of the scope of the statute's ban on redisclosure.

[23] As discussed previously, the failure of this bill to include a redisclosure provision for leaks of sensitive, classified information also calls into the most serious question petitioners' assertions that a redisclosure provision is essential to effectuate Title III's underlying ban on interceptions.

ously suggest that the statute could, consistent with its existing terms, be limited to prohibit only the disclosure of verbatim tapes of intercepted communications rather than the entire "contents" of those communications. Nor could it be modified so as not to apply to matters of "common knowledge," a proposal based upon a single sentence in a single congressional report but at war with the plain text of the statute and with Congress' obviously broad intent.[24]

Petitioners' remaining proposals – adoption of higher burdens of proof or more stringent standards of appellate review – are drawn from this Court's analysis of common law causes of action and its articulation of standards that would be sufficient under the First Amendment if subsequently adopted by a legislature. None involve a circumstance in which this Court has taken it upon itself to engraft a standard that conflicts with a statute's text. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (articulating "actual malice" standard applicable to defamation claims brought by public figures); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring proof of "clear and convincing evidence" in public figure defamation action); *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984) (requiring "*de novo*" review of actual malice determination). Just as important, none of these proposals would reduce the profound chilling effect of the redis-

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[24] Furthermore, this proposal would require an impermissible inquiry into the content of the disclosure, see *infra* at 47-50, and (as a few examples illustrate) would create far more questions than it would answer and therefore would not substantially reduce the chilling effect caused by the ban on redisclosure. For example, would "common knowledge" be measured locally, nationally, worldwide, or by some other measure, such that if a fact was known in a particular town, it could be published there but not in a national newspaper? What if a convention were in town at the time of publication? And, would liability attach if the underlying fact were publicly alleged but disputed, such that the contents of the interception would confirm the allegation? What if a newspaper knew that the same information was about to be disclosed by a competitor; would it have to allow itself to be "scooped"?

closure ban (much less address the statute's direct prohibition on protected speech). That a civil plaintiff must prove by "clear and convincing evidence" that the defendant "should have known" that particular information came from an intercepted communication, or that "*de novo*" appellate review will later apply to that determination, makes no real difference: the risks that disclosure will give rise to civil and criminal liability are still great and clouded in uncertainty.

Title III's prohibition on redisclosure is accordingly unconstitutional under even intermediate scrutiny.

II. Prohibitions on Redisclosure of Truthful Information Must Receive Strict Scrutiny.

While petitioners try – though fail – to show that the redisclosure provision satisfies intermediate scrutiny, they do not seriously suggest that application of the statute in this case could survive strict scrutiny. Instead they claim strict scrutiny does not apply. They are incorrect. There are multiple grounds for applying strict scrutiny here, and no colorable argument that the redisclosure ban either serves "compelling" interests or constitutes the least restrictive means of doing so.

A. The *Daily Mail* Principle Requires Strict Scrutiny in This Case.

In *Daily Mail*, this Court set out the principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. at 103. This Court reaffirmed *Daily Mail*'s application of strict scrutiny in *Florida Star*, holding that "where a newspaper publishes truthful information which *it* has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." 491 U.S. at 541 (emphasis added). The present case is materially indistinguishable from *Florida Star* for purposes of the standard of review, and consequently strict scrutiny applies.

There is no dispute that the information redisclosed by respondent Yocum was "truthful." Indeed, given petitioner Kane's claim to have made his threats rhetorically, Bartnicki Br. 5, redisclosure of the recording – context, inflection, and all – was a more accurate form of speech than any mere transcript, interpretive report, or other means of conveying information. Cf. Bartnicki Br. 17 (claiming to defend the statute only as applied to redisclosure of entire tape and declining to defend laws as they nonetheless apply to less accurate disclosures of "particular facts [respondents] learned from the tape without making public the actual verbatim recording"). And the union had its full say in the press, using the preferred First Amendment approach of more speech to place Kane's statements in such further context as it thought appropriate. See *supra* at 3. There is likewise no doubt that respondent Yocum receives the same protection under the *Daily Mail* principle as the media respondents.

The only dispute over application of the *Daily Mail* principle, therefore, is whether respondent Yocum "lawfully obtained" the information he redisclosed. Despite petitioners' attempts to conflate Yocum's *receipt* of the information with a third party's separate and prior alleged illegality in *intercepting* the communication, all petitioners ultimately concede that respondent Yocum had no involvement of any sort in the alleged intercept. Bartnicki Br. i (Question Presented); U.S. Br. i (Question Presented), 7. Respondent Yocum himself thus violated no laws in receiving and possessing the tape recording delivered anonymously to his house.

While any actual interceptor may have "unlawfully obtained" the information at issue – thereby taking *the interceptor's* initial disclosure outside of the *Daily Mail* principle – Yocum's lawful *receipt* of that information and subsequent *redisclosure* are indistinguishable from the facts of *Florida Star*. Indeed, in *Florida Star*, the initial disclosure by the police was itself wrongful, and in violation of the department's obligation "not to 'cause or allow to be * * * published' the

name of a sexual offense victim." 491 U.S. at 536. But despite this initial wrong on the part of the source, this Court held that the prior wrongful act did not "make the newspaper's ensuing *receipt* of this information unlawful. Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* (emphasis added). So, too, here: respondent Yocum's *receipt* of the tape was not unlawful. Neither the United States nor Pennsylvania has proscribed receipt or possession of intercepted information. Because Yocum was entirely innocent of any underlying wrongdoing and had lawfully obtained the information in this case, any laws penalizing his subsequent and truthful speech must receive strict scrutiny under *Daily Mail*.[25]

The Solicitor General attempts to distinguish *Florida Star* by citing the Court's dictum that "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." 491 U.S. at 534; U.S. Br. 29. The Solicitor General likewise cites to *Florida Star*'s recognition of an open question "whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8; U.S. Br. 29. Neither statement, however, applies to the situation in this case or refutes the applicability of the *Daily Mail* principle to redisclosure by a person who is individually innocent of any underlying illegality.

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[25] Mere knowledge of upstream illegality by a third party in connection with the information does not distinguish this case from *Florida Star*, in which the media defendants plainly had reason to know that the release by the police department of the information at issue was unlawful – it violated the very same law underlying the action against the newspaper. 491 U.S. at 536.

First, both of the hypotheticals posed by the preceding quotes refer to initial publication or disclosure by a person possessing the information through his *own* illegal acquisition of that information. But respondents are not challenging the provisions as applied to ban unlawful interception or initial disclosure by the interceptor himself. Rather, they are challenging the *re*disclosure provision as applied to wholly innocent recipients. Nothing in *Florida Star* suggests that a wholly innocent recipient would lose the protection of the *Daily Mail* principle based upon a prior wrong by another.

Second, the initial hypothetical suggests a possible exception only for "sensitive information," whereas the redisclosure ban in this case sweeps far more broadly than that. Certainly, the information here – a putative bomb threat in connection with public-sector labor negotiations – can hardly be the "sensitive" information that the Court had in mind.

Third, the latter statement's disjunctive reference to unlawful acquisition "by a newspaper or a source" is at best ambiguous about what the Court thought was unresolved, and in context seems to leave open only the disjunctive though parallel situations of publication by a guilty source to the newspaper or by a guilty newspaper to the public. That is a more natural reading of the second portion of the quote and its unitary references to punishing "the unlawful acquisition" and "the ensuing publication." It is simply too much of a stretch to claim that those latter references can be read to encompass re-publication by an *innocent* recipient.

Fourth, the cases cited in the remainder of footnote 8 of *Florida Star* more accurately illustrate the issue not "resolved" and the question that has been "reserved," U.S. Br. 29, outside the bounds of the *Daily Mail* principle. Thus, in both *Landmark Communications* and the Pentagon Papers case, the issue that remained up for grabs involved only publication by a directly *culpable* party, not re-publication by an *innocent* downstream recipient of a prior unlawful acquisition. See *Landmark Communications*, 435 U.S. at 837 ("We

are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."); *New York Times Co.* v. *United States*, 403 U.S. 713, 737 (1971) (White, J., concurring) (noting that it is a criminal act for an unauthorized recipient of a national defense document "to retain the document"); *id.* at 743 (Marshall, J., concurring) (noting that it is a crime to "receive" certain documents of the type at issue); *id.* at 751 n.2 (Burger, C.J., dissenting) (implying complicity between the paper and the thieves by noting that "the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise its sources and informants"). The question expressly reserved in *Landmark Communications* is not remotely apposite here. And the unresolved issue of post hoc liability in the Pentagon Papers case involved speakers who, unlike here, had seemingly violated the laws by mere receipt and possession of the documents in question and may well have been accomplices either before or after the fact of the underlying theft.

In short, the questions left open by prior cases up through *Florida Star* are still not presented by the current case, which deals only with a situation already covered in all material respects by the *Daily Mail* principle – an innocent recipient redisclosing information initially published to him and others by an unrelated upstream wrongdoer. Strict scrutiny applies.

B. Strict Scrutiny Should Apply Because The Redisclosure Ban Directly Restricts Speech.

Regardless of whether the *Daily Mail* principle itself applies, the laws here must receive strict scrutiny because they impose a direct and significant restriction on speech itself, rather than a merely incidental burden on speech from a restriction on conduct. Section 2511(1)(c) directly prohibits "disclosure" of information contained in certain intercepted communications, and consequently acts uniquely and exclusively on "speech." The Pennsylvania law goes even further, prohibiting disclosure not only of the contents of an intercepted communication, but also of information "derived" therefrom. 18 Pa. Cons. Stat. § 5703(2).

When, as here, regulations act directly upon speech and thus have as a necessary purpose the "suppression of free expression," intermediate scrutiny is inapplicable and strict scrutiny is required. *O'Brien*, 391 U.S. at 377; see also *City of Erie* v. *Pap's A. M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion) (strict scrutiny turns on whether the government regulation is related to the suppression of expression); *Nixon* v. *Shrink Missouri Gov't PAC*, 120 S. Ct. at 903 (noting *Buckley*'s rejection of *O'Brien* standard and application of strict scrutiny at least as to direct limits on expenditures); *Butterworth* v. *Smith*, 494 U.S. 624, 632 (1990) (strict scrutiny applied to direct ban on redisclosure of speech based upon prior venue – before a grand jury – of that speech); *Schneider* v. *State*, 308 U.S. 147, 160-64 (1939) (effectively applying strict scrutiny to content-neutral ban on leafleting). And because the broad prophylactic restrictions cover sweeping categories of information not themselves necessarily sensitive, confidential, or otherwise of concern, they are especially suspect. See *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. * * * Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citation omitted).[26]

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[26] Petitioners assert that this case does not involve any prior restraint on the publication or disclosure of information. Bartnicki Br. 19. But as a practical matter, the absolute prohibition on redisclosure regardless of any individual harm from the speech accomplishes the same practical result as punishment for violation of a prior restraint and thus increases the likelihood that the speaker will remain silent to the same extent as does a prior restraint such as a requirement to submit a specified category of speech to government censors. Furthermore, the availability of an injunction under 18 U.S.C. § 2512 demonstrates that the disclosure ban has the ability actually to be a prior restraint, not just to emulate one.

Petitioners incorrectly suggest that the restrictions herein are merely "incidental" and hence should be evaluated under the conduct test set out in *O'Brien* and its progeny. Bartnicki Br. 20; U.S. Br. 18-20. In *O'Brien*, the law forbade harmful conduct – the destruction of an official document – that was not inherently expressive. The impact on speech from that regulation of conduct was indeed "incidental," and hence eligible for intermediate scrutiny so long as various other conditions were met. 391 U.S. at 377. But the burden on speech in this case stems from a direct restriction on "disclosure," an inherently and exclusively communicative act.[27]

Nor are the speech restrictions in this case merely incidental consequences of otherwise generally applicable laws. The general state contract law at issue in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), for example, regulated the *conduct* of entering into enforceable agreements, regardless of the objects of such agreements. That the parties themselves made speech the object of their agreement may have had the effect of burdening speech, but the state law in question was still targeted at the conduct of contract formation, not at the speech that the parties had entangled with such conduct. The burden on speech in that case was truly "incidental" to the law's regulation of conduct, and was a function of the voluntary assumption of a contractual duty of confidentiality. This Court in *Cohen* itself distinguished the state-defined restrictions in *Florida Star* and *Daily Mail* by noting that the Minnesota law on promissory estoppel "simply requires those making promises to keep them. The parties themselves, as in

[27] Only the ban on interception itself fits the *O'Brien* framework of a conduct regulation that has an incidental impact on speech. The secondary redisclosure ban, however, is instead comparable in *O'Brien* terms to a ban on reporting, televising, or disclosing illegal conduct. Regardless whether the content of such reporting would be derived from an unlawful act, and might be argued to encourage such acts by providing them with a "market," no one could seriously suggest that such direct speech restrictions would be subject to less than strict scrutiny.

this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed." 501 U.S. at 671.[28]

In this case there is no such voluntary assumption of silence on the part of respondent Yocum, and he is being penalized entirely pursuant to a state-defined restriction on the "disclosure" of certain information. This case does not involve generalized restrictions on conduct that may have the incidental effect of limiting speech. Rather, the challenged laws operate directly to forbid activity – disclosure – that intrinsically and exclusively constitutes speech. It is thus unlike generic contract law or other general laws that prohibit harmful conduct such as destroying government documents regardless of whether such destructive acts may also have a communicative purpose.

Petitioners are also wrong in suggesting that the redisclosure ban does not directly suppress speech because other provisions of the law *also* suppress nonspeech "use" of intercepted information. Bartnicki Br. 20-21; U.S. Br. 23. The statutes themselves plainly identify a difference between use and disclosure, as reflected in their separate treatment of the two different behaviors. The Solicitor General's assertion, without a shred of support, that the prohibition on disclosure is encompassed by the "undifferentiated prohibition on use," and that "the only difference is one of clarity," U.S. Br. 24-25, renders the disclosure provision meaningless and mocks a fundamental canon of statutory construction routinely relied upon by this Court and often cited by the United States. See, *e.g.*, *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) ("The

[28] *Cohen* also noted that the newspaper may not have "lawfully" obtained the information it then published insofar as it "obtained Cohen's name only by making a promise that [it] did not honor." 501 U.S. at 671. The case thus fell outside the *Daily Mail* principle because the speaker was also the primary wrongdoer.

Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (citation omitted).[29]

Finally, the Solicitor General's suggestion, U.S. Br. 19, that the *O'Brien* standard has been extended to pure speech restrictions so long as they are content neutral is incorrect. The cases he cites for that proposition involved either time-place-manner restrictions or did not forbid speech at all. See *Procunier* v. *Martinez*, 416 U.S. 396, 409 (1974) (considering, in the prison context, restrictions on a "particular means of communication," but then striking those restrictions because they were content based); *Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 647, 661 (1994) (challenged regulations "do not produce any net decrease in the amount of available speech" and "leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements"; regulations "are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators").[30] Title III's rediscloure ban is not remotely like a time-place-manner restriction in that there is no alternative avenue for conveying the forbidden communications. Here, the content of the communication at issue is suppressed regardless of the time, place, or manner of the disclosure.

Contrary to the Solicitor General's assertion, therefore, the goals of the challenged provisions in this case are not "unrelated to the suppression of speech." U.S. Br. 19. Rather, the rediscloure bans are directly "[r]elated to the suppression of speech" given that all they do is suppress speech. That is

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[29] There is no claim in this case that respondent Yocum did *anything* with the tape other than engage in the pure speech of disclosure. The "use" restrictions on intercepted information are thus not at issue in this case.

[30] *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522 (1987), was a trademark case that the Court viewed as involving only a prohibition on the "manner" of expressing certain messages that might mislead or dilute the value of the mark.

their entire function and their sole goal – to suppress speech containing a particular class of information. Whatever the government's motives for wanting such speech suppressed, that does not change the character of, and hence the level of scrutiny to be applied to, a direct suppression of speech.

C. The Redisclosure Ban Is Content Based and Purportedly Justified by The Communicative Impact of Speech.

A speech restriction is content based – and hence subject to strict scrutiny – if the operation of, or justification for, that restriction turns on the content or the communicative impact of the speech to be restricted. As the United States itself concedes, "'even a regulation neutral on its face may be content based,' and hence subject to strict scrutiny, 'if its manifest purpose is to regulate speech because of the message it conveys.'" U.S. Br. 21 n.7 (quoting *Turner*, 512 U.S. at 645). In this case, penalties under the statutes are necessarily determined by reference to the content of the speech and are justified based on the communicative impact of the speech.

First, the redisclosure ban expressly penalizes disclosure of the "content" of an intercepted communication, and hence is, on its face, content based. The ban makes direct reference to specific information and expression and forbids speech containing such content. That the details of such "content" are variable, and must be determined by reference to contingent facts, *i.e.*, what was said in the intercepted communication, does not make the redisclosure ban any less content based. Numerous cases in which this court applied strict scrutiny are similarly contingent in their reference to the content of regulated speech. See, *e.g.*, *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (content of compelled speech contingent upon variable content of prior publication by paper); *Butterworth*, 494 U.S. at 627 (content of prohibited speech contingent upon entirely variable content of witness's testimony before grand jury).

Second, in making the determinations whether and to what extent liability exists, a decision maker must necessarily refer to the content of the prohibited speech. Likewise, a decision to sue, to prosecute, or for a jury to find liability would necessarily depend on the content of the allegedly intercepted speech and the content of the challenged "disclosure." Furthermore, in their attempt to save the statute from gross overbreadth, petitioners suggest that the law must be construed in a content-based manner, arguing that liability would eventually turn on the public or private nature of the intercepted communications. See Bartnicki Br. 17-18; U.S. Br. 44. While the statute does not say as much, the suggestion of such enforcement by the statute's own partisans amply illustrates how the decision to sue and to prosecute is uniquely vulnerable to decisions based on the perceived value of the speech, the perceived value of the intercepted communication, and on a variety of other content-driven concerns.

Third, the challenged speech restrictions are justified in substantial part by reference to the communicative impact of the disclosures, and hence must be treated as content based, regardless of whether they might be considered facially neutral. As the private petitioners recognize, and as the United States studiously ignores, one of Congress' primary concerns when it passed the anti-disclosure provision was with the "'privacy of communication.'" Bartnicki Br. 6 (quoting S. REP. NO. 90-1097, 90th Cong., 2d Sess. 67 (1968)). Congress was concerned with protecting specific categories of information, including "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns." *Id.* In short, Congress was concerned with protecting privacy and private information.

Petitioners' claim that the redisclosure ban displays no hostility toward and applies regardless of the message being conveyed, U.S. Br. 19, is not accurate. The law is plainly hostile toward the message insofar as the message conveyed is the disclosure of supposedly private information. The law

may not evidence any facial hostility toward any particular *viewpoint*, but it unquestionably is hostile to messages that contain private content. While viewpoint discrimination is sufficient to trigger strict scrutiny, it is not necessary to demonstrate such further discrimination when a law discriminates based on the content of a communication.[31]

Fourth, in addition to the content-based nature of the law and its justifications, the restrictions in this case are in fact being applied in a content-based manner. The current case is being selectively pursued against respondent Yocum, who was opposed to the salary demands of the union represented by the private petitioners. Petitioners also are pursuing the media respondents based upon antipathy towards the overall broadcast content from the media respondents, despite petitioners' admission that other members of the media had received copies and had disclosed the contents of the conversations. The only reason that the particular media respondents in this case were singled out appears to be a long-standing content-based disagreement with their reporting practices. Thus, petitioners Bartnicki and Kane engage in *ad hominem* attacks on the "journalistic practices" of the media respondents here and note that the local District Attorney's office discriminates against those respondents based upon their supposedly "irresponsible" journalism. Bartnicki Br. 6 n.2. That other members of the media allegedly did not disclose the in-

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[31] The Third Circuit recognized that the separate justification for the redisclosure ban based on the harm to privacy from each specific redisclosure turned on the communicative impact of the forbidden speech and therefore was not content-neutral. Pet. App. 26a-27a. But in merely deciding to ignore this justification in its analysis, the court erred. In *O'Brien*, intermediate scrutiny was applied where the law punished O'Brien for the "noncommunicative impact of his conduct, *and for nothing else.*" 391 U.S. at 382; see also *id.* at 381-82 ("both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct"). Here, even if *one* of the justifications for the law might be content neutral, such justifications are not the *exclusive* bases for the law and hence the *O'Brien* test is inapplicable.

formation until after respondent Vopper's broadcast is no basis for distinction given that neither the federal nor state statute draws such a first-publication line, petitioners repeatedly claim that each subsequent dissemination is independently harmful, and there is no claim in this case of actual harm or request for compensatory damages based on the first media disclosure. Bartnicki Br. 9. The redisclosure prohibition thus poses precisely the types of "inherent dangers to free expression" and the "potential for censorship or manipulation" that justify strict scrutiny. *Turner*, 512 U.S. at 661.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS;
KEYMARKET OF NEPA, INC., d/b/a WILK RADIO;
LACKAZERNE, INC., d/b/a WGBI RADIO;
JACK YOCUM, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the United States Constitution preclude application of 18 U.S.C. §§ 2511(1)(c)&(d) and analogous provisions of Pennsylvania law to Respondents' dissemination of truthful information about a matter of public concern, which they acquired lawfully.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Keymarket of NEPA, Inc., d/b/a WILK Radio and Lackazerne, Inc., d/b/a WGBI Radio respectfully incorporate the corporate disclosure statement contained in their Brief in Opposition to the petitions for writs of *certiorari*.

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STATEMENT OF THE CASE

Respondents Frederick W. Vopper, Keymarket of NEPA, Inc., and Lackazerne, Inc. ("the Media Respondents") supplement Petitioners' Statements of the Case as follows:

A. The Statutory Scheme

1. The question presented addresses the constitutionality, under the First Amendment, of the imposition of civil liability on Respondents pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.* ("Title III"), and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5702 *et seq.*[1] Title III regulates the "interception"—i.e., the "acquisition of the contents"—of wire, oral or electronic communications. 18 U.S.C. §§ 2511(1) (a), 2510(4). "Contents" is defined as a communication's "substance, purport, or meaning." *Id.* § 2510(8).

Title III separately defines "wire," "oral," and "electronic" communications. *Id.* §§ 2510(1), (2)&(12). "Oral" communications include only those made by a person "exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 2510(2). The definitions of "electronic" and "wire" communications, the latter of which includes communications via cellular telephone, contain no such limitation.

The statute permits judicially authorized interception by law enforcement officers. *Id.* §§ 2516, 2518.[2] It prohibits,

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[1] The Pennsylvania statute is identical to Title III in all relevant respects. The discussion that follows therefore references Title III exclusively.

[2] Congress has exempted from Title III's prohibition of "interception" other categories of communications. *See, e.g.*, 18 U.S.C § 2511(2)(d) (not unlawful for person *not* acting under color of law to intercept, if such person is party to communication or party has consented, unless "for the purpose of committing any criminal or tortious act"); § 2511(2)(g)(ii)(II)

however, receipt in evidence in any court of the contents of any unlawfully intercepted communication. *Id.* § 2515.

The provisions of Title III at issue provide that, when a person "know[s] or ha[s] reason to know" that information was obtained through an unlawful interception, the intentional "disclos[ure]" or "use[]" of its "contents" is prohibited. *Id.* §§ 2511(1)(c) & (d). Originally, every violation of Title III was punishable by a fine of up to $10,000 and/or imprisonment up to five years. Pub. L. No. 90-351, § 802, 82 Stat. 197, 213 (1968). In 1986, however, Congress reduced the applicable penalties for several categories of offenders. *See* Pub. L. 99-508, § 101, 100 Stat. 1848, 1852 (1986). Thus, a first-time interceptor of, *inter alia*, "the radio portion of a cellular telephone communication," who was not acting "for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain," is subject only to a modest fine, provided that the intercepted communication is not scrambled or encrypted. 18 U.S.C. § 2511(4)(b)(ii).

Title III also authorizes persons whose protected communications "are intercepted, disclosed, or intentionally used" to bring a civil action against the violator. *Id.* § 2520(a). Prevailing plaintiffs are entitled to equitable relief, actual damages or statutory damages, punitive damages, attorneys' fees and costs. *Id.* §§ 2520(b)&(c)(2).

2. "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating

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(not unlawful to intercept radio communication transmitted "by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public"); § 2511(2)(g)(v) (same with respect to co-users of frequency monitored by service provider if communication is not scrambled or encrypted); § 2511(4)(c) (exempting certain forms of interception unless undertaken "for purposes of direct or indirect commercial advantage or private financial gain").

on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 90-1097, at 66 (1968) ("1968 S. Rep."). As the Senate Report emphasized, "[t]he major purpose of Title III is to combat organized crime." *Id.* at 70; *see also, e.g., id.* at 75. In crafting Title III, Congress was principally concerned with preserving citizens' Fourth Amendment rights against unrestricted government eavesdropping. *See, e.g., id.* at 74-75. To the extent it addressed the subject of nongovernmental conduct at all, Congress sought to prevent private parties from what was generally described as "snooping." *Id.* at 224 (Sens. Dirksen, Hruska, Scott and Thurmond). In its applications beyond law enforcement, therefore, Congress expressed its interest in prohibiting the "private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." *Id.* at 225; *see* 113 Cong. Rec. 21,769 (1967).[3]

3. By the mid-1980s, Congress had become particularly troubled by law enforcement's increased use of wiretapping. *See* H.R. Rep. No. 99-647, at 18-19 (1986) ("1986 H. Rep."). This, coupled with a concern that Title III might not prevent governmental electronic surveillance of certain new telecommunications technologies, *see id.* at 17-19, led Congress to conclude in 1986 that "[a]dditional legal protection is necessary to ensure the continued vitality of the Fourth

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[3] *See also* President's Comm'n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* 187-209, 202 (1967) (private persons were wiretapping "to acquire evidence for domestic relations cases, to carry on industrial espionage and counterespionage, to assist in preparing for civil litigation, and for personnel investigations"); Office of Technology Assessment, *Federal Government Information Technology: Electronic Surveillance and Civil Liberties* (Oct. 1985) at 32-33 (noting "much documentation of illegal private wiretapping, by private detectives and others for industrial espionage and in domestic relations matters") (emphasis deleted).

Amendment," *id.* at 19; *see also* S. Rep. No. 99-541, at 5 (1986) ("1986 S. Rep.").

Among the new technologies Congress placed within Title III in 1986 was cellular telephone service, which the Department of Justice ("DOJ") had maintained was not, in many circumstances, then covered by the statute, in part because its users typically had no reasonable expectation that their calls would be private. *See* 1986 H. Rep. 31; *Privacy in Electronic Communications: Hearing Before the Subcomm. on Patents, Copyrights & Trademarks of the Sen. Comm. on the Judiciary*, 98th Cong. 32 (1984) (testimony of Deputy Assistant Attorney General Keeney). Indeed, the legislative history reflects universal agreement that, in 1986, cellular telephone conversations could easily be intercepted. *See, e.g.*, 1986 H. Rep. 20, 32. DOJ and others, therefore, urged Congress to adopt a narrower approach than simply expanding the definition of "wire communications" to include cellular telephones in all circumstances. Specifically, DOJ urged Congress either (1) to include cellular telephony within Title III only when a call is encrypted, or (2) to limit the full reach of Title III's prohibitions in the case of cellular technology only to law enforcement officers. *See, e.g.*, *Electronic Communications Privacy Act: Hearings Before the Subcomm. on Courts, Civil Liberties & Admin. of Justice of the H. Judiciary Comm.*, 99th Cong. 226-27 (1985-86) ("1986 H. Hearings"). Nevertheless, at the urging of the cellular industry, and with DOJ's ultimate acquiescence, Congress simply amended Title III's definition of "wire" communications to include cellular telephony.

The record before Congress even as early as 1986, however, documented an array of available and affordable encryption and scrambling technology for cellular telephones, ranging from $7 voice-inversion integrated circuits to $40 microchips. *Id.* at 169, 333 (Association of North American

Radio Clubs).[4] As one critic observed, the cellular telephone industry seemed "to regard legal deterrence as a substitute for . . . taking steps to protect the privacy of . . . customers, especially if those steps cost money." *Id.* at 338.

The legislative history of the 1986 amendments, like the congressional record amassed in 1968, is virtually silent with respect to the statute's "use" and "disclosure" provisions, including the potential ramifications of their extension to cellular telephones. And, as had been the case in 1968, there is no suggestion that Congress anticipated that these provisions would be applied beyond the realms of law enforcement, commercial espionage, and domestic relations.[5]

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[4] *See also* 1986 H. Hearings 190-203, 354-56 (advertisements for security devices for cellular telephones then available to consumers); *id.* at 512 (statement of Uniden Corp.) ("[U]sers can select a level of security for their telephones which is commensurate with the economic value they place on the telephone messages they are likely to transmit."). In recent years, the security of cellular telephone conversations has been materially enhanced as service providers convert to digital from analog service. *See, e.g.*, Andrew R. Hull, *The Digital Dilemma: Requiring Private Carrier Assistance to Reach Out and Tap Someone in the Information Age - An Analysis of the Digital Telephony Act*, 37 Santa Clara L. Rev. 117, 130 & n.107 (1996). In addition, "commercially available encryption products" are now "being used to protect all sorts of electronic communications," including cellular telephone calls. Charles Barry Smith, *Current U.S. Encryption Regulations: A Federal Law Enforcement Perspective*, 3 NYU J. Legis. & Pub. Pol'y 11, 12-13 & n.5 (1999).

[5] *See, e.g.*, 1986 H. Hearings 4 (Sen. Leahy) (Title III intended to "protect private communications from interception by an eavesdropper, whether the eavesdropper is a corporate spy, a police officer without probable cause, or just a plain snoop."); *id.* at 25 (Rep. Moorhead) (discussing interceptions of "gossip" or "information that can be useful in the financial world and elsewhere"). When Congress enacted Title III in 1968, it established a Commission to study the statute's effectiveness. In its 1976 report, the Commission found that "[t]he large majority of illegal eavesdropping involves marital or family relations." *Electronic Surveillance: Report of the National Commission for the Review of Federal &*

Indeed, in a related context, Congress expressed its concern that Title III had served to restrict public debate in an unintended fashion. Specifically, prior to 1986, Title III made it unlawful to intercept a communication even where one party had consented, if the interception was for the purpose of committing an "injurious act." Pub. L. No. 90-351, § 802, 82 Stat. 197, 214 (1968). The phrase had been seized upon by subjects of unflattering news reports to hold liable under Title III journalists who had recorded their interviews. 1986 H. Rep. 39 (citing *Boddie v. American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984)). Congress' deletion of the phrase in 1986 was intended to remove "the shadow of a finding that section 2511 has been violated by interceptions made in the course of otherwise responsible news gathering." *Id.* at 40.[6]

B. Statement of Facts

The telephone conversation at issue took place between Gloria Bartnicki and Anthony F. Kane, Jr., plaintiffs below, in

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State Laws Relating to Wiretapping & Electronic Surveillance xviii (1976); *see id.* at 160 (of cases studied by Commission, 68% involved marital wiretapping, 11% involved other domestic eavesdropping, 7% involved business firms and industrial espionage). Moreover, to the extent that Title III had been successful in reducing the incidence of illegal interceptions, the Commission observed that it was the result of the statute's "controls on the manufacture, sale, and advertising of [scanning] devices and its criminal sanctions for their use." *Id.* at xviii.

[6] *See also* 1986 H. Hearings 52 (OTA statement):

> The fact that communications are to some degree open, whether intentionally or through "leakiness," helps enforce public accountability for the behavior of people and organizations. . . . For example, the investigative press, public interest groups, and even the Congress, itself, depend to some extent on open or leaky information flows to monitor for threats to the public interest in both the private and public sector. In this case, the danger may come from the accumulation of laws responding to the challenges of new information technology, covering issues ranging from intellectual property to wiretapping to computer crime.

May 1993. At the time, Kane was a teacher at Wyoming Valley West High School and served as president of the local bargaining unit of the Pennsylvania State Education Association ("PSEA"). J.A. 78-79.[7] Bartnicki was PSEA's "chief negotiator." J.A. 99. During their telephone conversation on the eve of a teachers' strike, Kane and Bartnicki talked about the gap between the percentage salary increase offered by the school district and that demanded by the teachers, *see* J.A. 78-80, 104-06, and Kane made the following statement directed to the local Board of Education:

> If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . .

J.A. 46.

The telephone conversation was tape recorded. An unknown person deposited a copy of the recording, without any markings to identify its origin, in the mailbox of a member of the School Board and another in the mailbox of Jack Yocum. J.A. 14, 114; Burns Dep. 16. Yocum, the president of an association of concerned taxpayers, promptly alerted several members of the Board to the tape's contents and, in fact, played the entire recording for them. J.A. 116. At least one School Board member had been informed about the tape and its contents at a local tavern before he was contacted by Yocum. Burns Dep. 12-14.

After learning the contents of the conversation, at least two members of the School Board became concerned for their

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[7] Deposition excerpts not included in the Joint Apendix ("J.A.") are identified by the deponent's last name and relevant page number, e.g., "Burns Dep. __." "App." refers to the Appendix to the Petition for a Writ of Certiorari filed by the United States in No. 99-1728. Citations to Petitioners' briefs in this Court in No. 99-1687 and No. 99-1728 are to "Plaintiffs' Brief at" and "U.S. Brief at," respectively.

physical safety. Warman Dep. 22, 38; Burns Dep. 15, 18. The negotiations had been characterized by unusual "animosity" on both sides, J.A. 139, including acts of unexplained vandalism,[8] threats of economic reprisals directed against taxpayers opposing the teachers' demands, *see* J.A. 139, 143-47, and other comments by both sides perceived as threats of violence, *see* Gaiteri Dep. 10-11; Olszewski Dep., Ex. 1, at 3; Bartnicki Dep., June 13, 1995 ("Bartnicki II"), at 27-28. The School Board discussed the tape's contents at its next meeting and formally requested a criminal investigation. Olszewski Dep. 5 & Ex. 1, at 1; McAndrew Dep. 17.

Yocum also provided copies of the tape to several local media entities, including at least one other radio station and two newspapers in addition to the Media Respondents. J.A. 83-84, 100, 117.[9] None of these media entities, including the Media Respondents, played any role in intercepting the Bartnicki-Kane conversation or in soliciting its contents from Yocum or from anyone else. J.A. 72, 118-19.

For three days, the Media Respondents made the contents of the conversation the subject of a public affairs program broadcast in the community affected by the controversy surrounding its public schools. Vopper Dep. 31, 37; Burns Dep. 20-21, 40; Warman Dep. 29-30. The program is hosted by Respondent Vopper, known to his listeners as "Fred

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[8] A cinder block was thrown through the car window of one member of the teachers' negotiating team. Kane Dep., June 20, 1995 ("Kane II"), at 73; Olszewski Dep., Ex. 1, at 2. A School Board member had the tires of his car punctured. McAndrew Dep. 25.

[9] The record is unclear concerning both when Yocum in fact received the recording and when he provided a copy of it to the Media Respondents. *Compare* J.A. 72 *with* Yocum Dep. 30, 33-34, 54; Vopper Dep. 20-21; Warman Dep. 17-20; Burns Dep. 12-20. It is, however, undisputed that Yocum disseminated the contents of the conversation to the School Board and to others before any broadcast by the Media Respondents. *See, e.g.*, Warman Dep. 17-20; Burns Dep. 12-20.

Williams," *see* Vopper Dep. 6, who had for some time been an outspoken critic of the teachers and their negotiating demands. The programs were broadcast in connection with a significant news event—the announcement of an arbitrator's proposal to settle the ongoing dispute. J.A. 105.

During these three broadcasts, Vopper played the tape recording once in its entirety, played portions of it repeatedly, and discussed its contents with dozens of listeners and with two members of the School Board, who appeared as guests on the program. Vopper Dep. 31-32; Burns Dep. 40; Warman Dep. 29-30.[10] Throughout the broadcast discussion, Vopper expressed his strong disapproval of the tactics he believed were revealed by the tape's contents, called for both Kane and Bartnicki to resign, and urged the School Board not to be intimidated. Vopper Dep. 37.

Immediately following Vopper's initial broadcast, other local media disseminated the contents of the recording as well. At least two local television stations reported stories disclosing its contents and played portions of it later that day and evening. J.A. 86-88, 156; Kane I Dep. 32; Vopper Dep. 29-30. Two local newspapers published articles about the matter in their next editions, and one included a transcript of portions of the conversation. J.A. 85; Kane II Dep. 31.

Negotiations between the teachers and the School Board, and the resulting strike, had been a "regular subject of the local media" long before the broadcasts at issue. J.A. 40, 79, 130, 138-39, 141-42. As the Third Circuit observed, "[t]he public interest [in] and newsworthiness of the conversation broadcast and disclosed by the defendants are patent." App. 36a.

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[10] *See* Defendants' Responses to Plaintiffs' Interrogatories No. 6; *see also* Vopper Dep. 31 (tape in its entirety played again in May 1994).

Bartnicki and Kane contend that their conversation was unlawfully intercepted and believe they know who did so. Kane Dep., Dec. 30, 1994 ("Kane I"), at 64-68; Bartnicki Dep., Dec. 30, 1994 ("Bartnicki I"), at 38-40, 95-96; Olszewski Dep., Ex. 1, at 4-5. On their behalf, PSEA requested a criminal investigation. Palutis Dep., Ex. 1. The District Attorney, however, declined to "expend significant resources" on the matter because, he concluded, they could be better devoted to investigating "murders and child abuse and other violent felonies." Olszewski Dep. 14, 38-39.[11]

In August 1994, Bartnicki and Kane, funded by PSEA, *see* Palutis Dep. 55, instituted this civil action against the Media Respondents, alleging that they had violated Title III by disseminating the contents of the conversation to the public. The Complaint did not name as defendants any of the other media entities that had publicly disseminated the same information within the same twenty-four hour period. J.A. 12-14, 133. Kane made this decision because he strongly objected to the criticism of him expressed by Vopper during the broadcasts, which he characterized as "ranting and raving, screaming." Kane I Dep. 125; *see also id.* 116-17; Kane II Dep. 22-23; J.A. 97-98. Similarly, Bartnicki objected to such criticism by the Media Respondents, but at the same time "appreciated" the "fair[ ] and accurate[ ]" manner in which other media entities had disclosed the content of her conversation with Kane. Bozinski Dep. 27.[12]

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[11] Neither Yocum nor the Media Respondents knew in fact that the Bartnicki-Kane conversation had been illegally intercepted or that their dissemination of its contents was unlawful. J.A. 114-5; Getz Dep. 41-43, 46. Indeed, it is undisputed that, prior to the broadcasts, Vopper contacted Pennsylvania Attorney General Earnest Preate, who informed him that the Media Respondents could lawfully disseminate the information they had innocently acquired. Vopper Dep. 21-23.

[12] The claim for punitive damages is premised on Kane's contention that Vopper "poked fun at me; he tried to incite people. . . . I don't think anybody has to be subjected to that. He called me a goon. He said, I was incompetent." Kane I Dep. 116.

Bartnicki and Kane make no claim in this case that they suffered any compensable injury. J.A. 93-95, 98, 130. At the time of the conversation, Kane was aware that his comments might be intercepted, J.A. 88-89, and Bartnicki had received express, written warnings from her cellular telephone provider that calls could be intercepted, J.A. 108, 151-52; Elison Dep. Ex. 2. Both, however, testified that they suffered injury to their reputations as a result of the Media Respondents' criticism of their conduct. *See, e.g.*, Kane I Dep. 96 ("I feel my reputation as a professional person in the community and a citizen of this community—I've been a good citizen—has been held up to ridicule . . . ."); Bartnicki I Dep. 48 (same).

C. Proceedings Below

Following extensive discovery, all parties moved for summary judgment. The district court denied these motions on the ground that, although "there exists a great likelihood that the conversation was inadvertently intercepted and recorded," thereby taking the subsequent dissemination of its contents "outside the scope" of Title III, the record also reflected "references within the conversation indicating the confidential nature of the conversation and the fact that it was being conducted via a cellular telephone," evidence that precluded summary judgment. App. 63a-64a. The district court also rejected the contention that the First Amendment prevented application of Title III to the Media Respondents, concluding that the statute is immune from constitutional scrutiny because its terms "apply equally to the general public and impose no further restrictions on the media." App. 66a (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)).

Thereafter, the district court certified the constitutional issue for interlocutory review in the Third Circuit. App. 76a. The Third Circuit accepted the certification and reversed the district court's order denying summary judgment to Respondents. App. 1a, 42a. In so ruling, the Third Circuit "declined" to read *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), "as controlling." App. 13a. It concluded that, in *The Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989), this Court had "explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny." App. 13a. The Court of Appeals, however, abandoned the district court's conclusion that *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), rendered the First Amendment inapplicable to Title III. *See* App. 15a-17a. Similarly, the Third Circuit rejected the contention that Title III "impose[s] only incidental burdens on expression." App. 18a. Nevertheless, the court concluded that Title III is "properly treated as content-neutral" and therefore subject to "intermediate" First Amendment scrutiny. App. 28a.

Ultimately, however, the Third Circuit determined that, as applied in this case, Title III fails to survive such scrutiny because it is not "'narrowly tailored to serve a significant governmental interest.'" App. 30 (citation omitted). Although the court acknowledged that the general "interest in protecting privacy" constitutes a "significant state interest," App. 32a, it concluded that the "connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best," App. 33a. Moreover, the Government had "offered nothing other than its *ipse dixit*" to buttress its otherwise "unsupported allegation that the statute is likely to produce the hypothesized effect." App. 33a, 34a. The court also expressed "concern[] that the

provisions will deter significantly more speech than is necessary to serve the government's asserted interest." App. 36a.[13]

SUMMARY OF ARGUMENT

Title III categorically prohibits the dissemination of the "contents"—i.e., "the substance, purport, or meaning"—of any communication intercepted unlawfully pursuant to its terms. 18 U.S.C. §§ 2510(8), 2511(1)(c)&(d). It does so even when the content so disseminated is entirely accurate and addresses a matter of significant public concern, when it has previously been disseminated by and to others, when the complaining party had no reasonable expectation that the intercepted conversation would remain private and has suffered no injury as a result of the dissemination, and when the disseminating party played no role, of any kind, in the unlawful interception.

Petitioners seek to apply Title III to two radio stations and the host of a public affairs program who engaged in pure speech and nothing more—the public dissemination of the contents of a telephone conversation in which two officials of a public school teachers' union apparently threatened to blow up the homes of members of the local School Board. The Media Respondents received the information from a third party who, like them, played no role in its initial acquisition. They disseminated it only after it had already been shared with others, including another radio station, two newspapers, and several members of the School Board. Within hours of their first broadcast, the same information was disseminated by several television stations and two local newspapers. Title III has been invoked only against them, however, in substantial part because the individual petitioners here seek to punish the criticism of their conduct that was part and parcel of the Media Respondents' broadcasts.

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[13] Judge Pollak dissented, concluding that Title III satisfied intermediate scrutiny as applied here. App. 50a-51a.

I. Application of Title III under these circumstances violates the First Amendment. The dissemination of truthful information about matters of public concern receives the full protection of the Constitution. The legislature may directly prohibit the dissemination of such information only in those rare instances when doing so is necessary to vindicate a governmental interest "of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979). This fundamental principle has been consistently articulated in a series of cases, including *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Butterworth v. Smith*, 494 U.S. 624 (1990).

A. Application of the "*Daily Mail* principle" is not affected by the fact that a third party allegedly engaged in unlawful conduct when he or she acquired the information in the first instance. *Conduct*—including the interception of telephone conversations—can properly be regulated and prohibited by statute. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). Nevertheless, where—as here—the parties before the Court engaged in no unlawful conduct of any kind, the First Amendment precludes the legislature from prohibiting the pure act of speech. The act of unlawful acquisition—which is itself conduct and not speech—remains subject to legislative prohibition. The information so acquired, however, is of obvious First Amendment value, provided it is accurate and addresses a matter of public concern. That information is not tainted and its value is not diminished when it is disseminated by someone who has engaged in no actionable conduct. A contrary rule, which would permit government to prohibit forever the dissemination of information by anyone because its initial acquisition was unlawful or improper, would fetter too much speech, including the expression at issue in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and in *Florida Star*.

B. Application of the *Daily Mail* principle is not dependent upon whether Title III is deemed to be "content-based." That

inquiry is essential when determining whether legislation regulating the "time, place or manner" of expression violates the First Amendment, or in assessing whether "expressive conduct" may constitutionally be regulated. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *O'Brien*, 391 U.S. at 376. It has no proper role, however, where—as here—a legislative enactment constitutes a direct prohibition on the dissemination of pure speech. That conclusion is reflected in *Butterworth*, 494 U.S. at 624, in which the Court expressly applied the *Daily Mail* principle to a "content neutral" statute that directly prohibited the dissemination of information. *See also Buckley v. Valeo*, 424 U.S. 1 (1976); *Landmark*, 435 U.S. at 829. Whatever else this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), may encompass, it does not transform a direct prohibition of speech into a "neutral law of general applicability." This is not a case, like *Cohen*, in which the press asserts that the First Amendment protects it from the application of generally applicable laws regulating conduct when its journalists gather the news, or in which a law regulating conduct has only an "incidental" impact on speech itself.

II. Application of Title III in this case cannot be squared with the *Daily Mail* requirement that its prohibition of speech be necessary to vindicate a governmental interest "of the highest order." The "personal privacy" interest asserted here—i.e., the individual petitioners' interest in discussing their negotiating strategies confidentially—does not rise to that level. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 (1975); *Florida Star*, 491 U.S. at 537. The remaining interests asserted—creating an additional disincentive for unlawful interceptions and fostering the development of new communications technologies—are, like the asserted privacy interest, legitimate subjects for government regulation. They are not, however, "of the highest order." *See Daily Mail*, 443 U.S. at 104-05; *Worrell News-*

papers of Ind., Inc. v. Westhafer, 739 F.2d 1219, 1223-24 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985).

III. A. Even if the *Daily Mail* principle does not otherwise apply, Title III's application in this case fails "intermediate" First Amendment scrutiny. Indeed, the principal interest asserted by the Government—protecting claimants such as Bartnicki and Kane from the additional injury allegedly caused by dissemination of the contents of their communications to the public—is directly "[ ]related to the suppression of free expression." *O'Brien*, 391 U.S. at 377. That fact, standing alone, renders Title III's application in this context constitutionally invalid. *See Buckley*, 424 U.S. at 17.

B. The asserted governmental interests, though by no means insubstantial, cannot properly be achieved in the manner at issue here because they are not advanced in a meaningful sense. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). In fact, unlike unlawful interception in the contexts of commercial espionage or divorce, there is no basis to contend either that there is a "market" for information so acquired or that it will "dry up" if dissemination is prohibited where, as here, the information involves a matter of public concern and money does not drive the "market" for it. The asserted necessity of Title III's prohibition on the dissemination of information is further undermined by Congress' conclusion that no such prohibition is necessary in analogous circumstances, including to secure the privacy of the mails. *See* 18 U.S.C. §§ 1702, 1708.

C. Title III is not "narrowly tailored" to serve any of the asserted interests without restricting First Amendment freedoms to a greater degree "than is essential." *O'Brien*, 391 U.S. at 377. All of the asserted interests can be vindicated more directly and effectively by legislating meaningful criminal penalties for the misconduct that the Government seeks to deter—the unlawful interception itself. Moreover, Congress may, as it has in related contexts, provide legislative

incentives for the development of new technologies, such as digital telephony and encryption, that serve to prevent interception, or provide disincentives for the development of technologies that permit interception in the first instance.

Most significantly, Title III prohibits the dissemination of considerably more speech than is necessary. Title III prohibits *any* discussion of the "substance, purport or meaning" of an intercepted communication by anyone, a restriction on free expression that extends well beyond the broadcast of a tape recording to encompass the critical public discussion of the information revealed in that recording at the core of the radio program at issue. The statute also prohibits Yocum's notification of School Board members that they may be in danger, any newspaper reporting about the School Board's subsequent request for a criminal investigation, and any local citizen's discussion of the subject across the dinner table. And, as this case demonstrates, Title III provides a powerful vehicle for private litigants (and prosecutors as well) to pick and choose among these various "disclose[rs]" and "use[rs]" to punish only those who have been critical of them or their conduct.

Under these circumstances, there is no merit to Petitioners' contention that competing First Amendment "interests" are at stake in this case. The First Amendment typically prohibits the legislature from enacting laws that compel unwilling speakers to talk, *see, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977), but no such governmental action is before the Court in this case. Rather, Title III purports to prohibit directly and absolutely the dissemination of information. Such a law cannot be saved from a finding that it is unconstitutional, at least in these circumstances, by an assertion that it is intended to protect against the infringement of First Amendment "interests" by nongovernmental actors. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

ARGUMENT

I. THE MEDIA RESPONDENTS' DISSEMINATION OF TRUTHFUL INFORMATION ABOUT A MATTER OF PUBLIC CONCERN IS PROTECTED BY THE FIRST AMENDMENT UNLESS ITS PROHIBITION IS NECESSARY TO VINDICATE AN INTEREST OF THE HIGHEST ORDER

The relevant provisions of Title III, on their face, prohibit any person from disclosing or using the "contents" of a communication he knows or has reason to know has been unlawfully intercepted. 18 U.S.C. §§ 2511(1)(c)&(d). The "contents" of a communication include any information concerning its "substance, purport, or meaning." *Id.* § 2510(8).

These prohibitions have been applied to the Media Respondents' dissemination of truthful information about a matter of public concern, despite the fact that they played no role in an unlawful interception. This case, therefore, is properly controlled by the "principle" announced in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)—i.e., the legislature may not punish the dissemination of "truthful information about a matter of public significance" that has been lawfully obtained "absent a need to further a state interest of the highest order." *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

The "*Daily Mail* principle" proceeds from the premise that "truthful information about a matter of public significance" receives the full protection of the First Amendment. *The Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989). It follows from this Court's recognition that, even when "a matter of public significance" is not involved, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Daily Mail*, 443 U.S. at 102. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (even in commercial

speech context, "the First Amendment presumes that some accurate information is better than no information at all").

"[W]here discussion of public affairs is concerned," however, the protection of truthful speech is at its zenith. Under such circumstances, "[t]ruth may not be the subject of either civil or criminal sanctions," because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) ("speech of public concern is at the core of the First Amendment's protections") (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)). Thus, the "freedom of speech and of the press guaranteed by the Constitution embraces *at the least* the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (emphasis added).

Petitioners offer twin theories to support their contention that the *Daily Mail* principle does not govern this case. They assert that *Daily Mail* is inapplicable because the information at issue here was initially acquired through an unlawful interception. *See* U.S. Brief at 29. In addition, they contend that Title III's prohibition on dissemination is not governed by the *Daily Mail* principle in any event because it is "content-neutral" and because it constitutes a "'generally applicable law'" that has only an "'incidental'" impact on the press's "'ability to gather and report the news.'" Plaintiffs' Brief at 21 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)). Such contentions are without merit.

A. The Information At Issue Was "Lawfully Acquired" Within The Meaning Of *Daily Mail*

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 n.1 (1978), in violation of a criminal statute, an

unidentified person provided to a newspaper information about a confidential proceeding before Virginia's Judicial Inquiry and Review Commission. This Court held that the statute could not constitutionally be applied to the newspaper's subsequent disclosure of the same information. *Id.* at 845. In so holding, the Court indicated that it was not "concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Id.* at 837.

The following term, when it first articulated the "*Daily Mail* principle," the Court invoked *Landmark* to invalidate application of a criminal statute to a newspaper that had "relied upon routine newspaper reporting techniques" to secure the identity of a juvenile offender, which it then published in violation of that statute. *Daily Mail*, 443 U.S. at 103. Where, as in that circumstance, such "information is lawfully obtained," the Court held, "state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order." *Id.*

This holding, itself distilled from prior cases, was first identified as the "*Daily Mail* principle" in *Florida Star*, where, in violation of Florida law, a sheriff's department provided the identity of a woman who had been raped to a newspaper, which then published her name. *See* 491 U.S. at 526-27. The woman filed a civil action against both the sheriff's department and the newspaper, which the department settled prior to trial. *Id.* at 528. The "*Daily Mail* principle," this Court held, precluded the imposition of liability on the newspaper because it had "lawfully obtain[ed]" this accurate information about a matter of public concern. *Id.* at 533-34.

The Court noted that the *Daily Mail* principle does not necessarily apply "in cases in which information has been acquired unlawfully by a newspaper or by a source," and does not resolve whether, in such circumstances, "government may ever punish not only the unlawful acquisition, but the ensuing

publication as well." *Id.* at 535 n.8 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). That question, the Court observed, had been "reserved" in *Landmark*. 491 U.S. at 535 n.8. Thus, the Court indicated, where "sensitive information" resides not with public officials, but "in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of the information so acquired." *Id.* at 534..

Petitioners erroneously contend that this language implicitly holds that the *Daily Mail* principle does not protect the Media Respondents in this case because the information they disseminated was acquired unlawfully by someone else. The "lawfully obtained" requirement of the *Daily Mail* principle is derived, as *Florida Star* explained, directly from *Landmark*, in which the Court reserved only "the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." 435 U.S. at 837. Indeed, although *Landmark* is itself silent on the point, it stands to reason that whoever initially disclosed confidential information in that case did so in violation of a statutory duty imposed upon him as a participant in the Commission's proceedings. The police official who provided B.J.F.'s name to the newspaper in *Florida Star* did so in violation of an analogous duty. *See* 1975 Op. Fla. Att'y Gen. 075-203 ("A police chief who is the custodian of any such records containing such identifying information is obligated and charged with the duty by operation of law not to allow or permit public inspection or examination of such records."). Under Petitioners' construction of *Florida Star*, therefore, the newspapers in that case and in *Landmark* would enjoy no First Amendment protection for their own publications.

The issue actually "reserved" in *Landmark* and in *Florida Star* reflects this Court's consistent recognition that unlawful *conduct* is not itself protected by the First Amendment and

that, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The act of unlawful acquisition constitutes conduct that properly raises a question concerning whether dissemination by the same actor may be prohibited consistent with the First Amendment. The expression disseminated remains fully protected, however, at least when undertaken by a third party who has engaged in no unlawful conduct. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (plurality opinion of Stevens, J.). ("The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.").

Neither *Florida Star* nor *Landmark* purports to resolve under what circumstances, if any, the "nonconsensual acquisition" of information would warrant application of the statutes at issue in those cases to a source or a newspaper that itself engaged in such unlawful conduct. The cases cannot, however, reasonably be read to suggest that those who engage only in pure speech, and no unlawful conduct of any kind, are properly deprived of the First Amendment's protections because the information they disseminate was acquired unlawfully by someone else.[14]

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[14] This conclusion is not inconsistent with *Florida Star*'s citation to *New York Times Co. v. United States*, 403 U.S. 713 (1971), in which several justices "raised"—but the Court did not resolve—whether the government's interest in preserving national security justified prosecution of newspapers that had published information unlawfully acquired by their source, even when it was insufficient to validate a prior restraint. *See* 491 U.S. at 535 n.8. In that context, some courts have held that, although the "First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security,'" the judiciary often must "defer[] to the decisions of the political branches of government" in determining whether that governmental interest justifies the prohibition of truthful speech, even about matters of public concern. *United States v. Morison*, 844 F.2d 1057, 1081-82 (4th Cir. 1988) (Wilkinson, J., concurring).

Even if *Florida Star* did leave open the question now raised by Petitioners, the First Amendment must be construed in a manner that honors the line between protected truthful speech about matters of public concern, on the one hand, and unlawful conduct that is properly subject to regulation, on the other. Whether that line can constitutionally be drawn to expose a radio station or its source to criminal or civil sanctions for the dissemination of such information when they engage in unlawful conduct to acquire it is no more before the Court in this case than it was in *Landmark* or in *Florida Star*. Thus, unless the Court is prepared to recognize a new category of unprotected expression—i.e., speech unlawfully acquired at its inception—the dissemination of truthful information about matters of public concern, without more, must continue to take shelter under the *Daily Mail* principle. This Court has heretofore recognized no such category and has, to the contrary, both "narrowed the scope of the traditional categorical exceptions" for defamation, obscenity, fighting words, and the like, and cautioned that the unprotected categories must be "limited" to expression which is "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

The notion that "unlawfully acquired truthful speech about matters of public concern" falls beyond the scope of the Constitution, when untethered from any unlawful conduct by the speaker, is at war with this "firmly entrenched part of our

First Amendment jurisprudence." *R.A.V.*, 505 U.S. at 400 (White, J., concurring in judgment). As *Chaplinsky* itself recognizes, limited categories of unprotected speech exist solely because we are confident that they are at best of "slight social value as a step to truth." 315 U.S. at 572. The expression at issue here—accurate information about matters of public concern—is at the opposite end of the constitutional spectrum; it "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation omitted). Petitioners' thesis, that such information is effectively and forever "tainted" upon its initial acquisition, such that any subsequent recipient may be prohibited from disseminating it further, cannot be reconciled with the "liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill*, 310 U.S. at 101-02.[15]

B. Application Of The *Daily Mail* Principle Is Not Affected By Whether The Statutory Prohibition Is "Content Neutral" Or Constitutes A Law Of "General Applicability"

Whether or not Title III is deemed to be "content-neutral" is of no relevance where, as here, the statute expressly pro-

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[15] The common law has cabined the reach of the privacy tort of "intrusion upon seclusion," *Restatement (Second) of Torts* § 652B (1977), in an analogous manner. In the leading case of *Pearson v. Dodd*, 410 F.2d 701, 703-05 (D.C. Cir. 1969), the court rejected an intrusion claim asserted against journalists who had received and published the contents of documents stolen from a United States Senator's office without their assistance or prior knowledge. *Accord McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 79 n.14 (8th Cir. 1976); *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 656 (Md. Spec. App. 1979); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 842 (Kan. App. 1979); *Doe v. Mills*, 536 N.W.2d 824, 833 (Mich. App. 1995).

hibits the dissemination of information. The constitutionality of such legislation is governed by the *Daily Mail* principle.[16]

In *Butterworth*, for example, this Court invalidated a Florida statute that, without regard to its content, prohibited grand jury witnesses from disclosing their own testimony. Florida had argued that the statute was properly subject to intermediate scrutiny under the so-called *O'Brien* standard as set forth in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *See* 494 U.S. at 631; Brief for Petitioners, *Butterworth v. Smith*, No. 88-1993, at 19. The Court, however, rejected the contention, and subjected the statute's direct prohibition on expression to scrutiny under the *Daily Mail* principle. *See* 494 U.S. at 632. Similarly, in *Landmark*, the Court held unconstitutional a statute that prohibited dissemination of any information regarding proceedings before Virginia's judicial review commission, without regard to its content.

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[16] The dissemination prohibition contained in Title III is, in fact, "content-based." It prohibits, on its face, the dissemination of "any information concerning the substance, purport or meaning" of an intercepted communication. 18 U.S.C. § 2510(8). To determine whether Title III applies to a given communication, therefore, its "contents" must be assessed. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984). Moreover, the legislative justification rests, in significant part, on the impact of the communication's content on those to whom it is disseminated and the consequent injury it allegedly causes to those whose communications have been intercepted. *See, e.g.*, 1968 S. Rep. 90 ("The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication."). Where, as here, the legislative justification for restricting expression is a function of "[l]isteners' reactions" to it, "analysis of the measure as a content-based statute [is] appropriate." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see Providence Journal Co. v. FBI*, 602 F.2d 1010, 1014 (1st Cir. 1979) ("The distinction between focussing on the content of information and on the manner of obtaining it blurs when the very manner of obtaining information carries such a likelihood of discovering private facts.").

Petitioners have little to say about *Butterworth* and *Landmark*, beyond suggesting that those statutes "can be understood as not content neutral" because they were "justified by the interest in suppressing speech about the workings of a particular governmental proceeding," U.S. Brief at 31 n.9, or because the statute in *Butterworth* was "confined to information relating to the government's attempt to secure an indictment," Plaintiffs' Brief at 23 n.6. Such reasoning, however, would similarly yield the conclusion that Title III is "content-based," because its prohibition on dissemination is justified by the interest in suppressing a category of speech deemed by the legislature to be invasive of privacy or because it is confined to prohibiting dissemination of the anticipated content of a class of communications declared confidential by law. *See* note 16 *supra*. More importantly, Petitioners' own argument that Title III is content-neutral since it does not regulate "'speech because of [agreement or] disagreement with the message it conveys,'" U.S. Brief at 21 (citation omitted), applies equally to the legislation before this Court in *Butterworth* and *Landmark*.[17]

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[17] Petitioners' observation that *Butterworth* does not foreclose legislation that prohibits the dissemination of information by those who assume a duty of confidentiality before they acquire it, *see* Plaintiffs' Brief at 23-24, is of no relevance to this case. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and similar cases do not contain any suggestion that speech may be prohibited so long as the prohibition turns on the "means by which the information had been acquired," Plaintiffs' Brief at 24. Rather, such cases stand for the different proposition that there is no First Amendment right to disseminate information that overcomes a prior agreement, oath or court order that such information would be provided in the first instance only if it is kept confidential. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 606 (1995) ("[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public") (citing *Seattle Times*, 467 U.S. at 31; *Snepp v. United States*, 444 U.S. 507 (1980)).

Under Petitioners' reasoning, moreover, the Federal Election Campaign Act's limitation on independent expenditures, which applied broadly to all such expenditures regardless of the content of speech, was "content neutral." *See Buckley v. Valeo*, 424 U.S. 1 (1976); *see also Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in judgment) (describing *Buckley* as "striking down content-neutral limitations on financial expenditures"). Yet, this Court recognized that, because those limitations "impose[d] direct and substantial restraints on the quantity of political speech," they were properly subjected to strict First Amendment scrutiny. *Buckley*, 424 U.S. at 39; *see Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 903 (2000). Indeed, the Court expressly distinguished such direct prohibitions from those categories of cases in which intermediate scrutiny is appropriate, such as the regulation of the "time, place and manner" of expression or of conduct associated with speech. *See Buckley*, 424 U.S. at 17-18 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949); *O'Brien*, 391 U.S. at 382). The "critical difference," the Court explained, is that, unlike the regulation of conduct or of the time, place or manner of speech, where it is often difficult to ascertain whether the regulation at issue is in fact aimed at suppressing expression, the statute in *Buckley* "impose[d] direct quantity restrictions" on speech itself. 424 U.S. at 18.[18]

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[18] Even in cases in which intermediate scrutiny is the generally applicable standard, the Court has recognized that the constitutionality of blanket prohibitions on expression must be assessed more rigorously, whether or not they are "content-neutral." Thus, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), although the City relied on a "content-neutral justification for its ordinance" and this Court assumed that it was "free of impermissible content or viewpoint discrimination," it nevertheless held the ordinance unconstitutional because it "foreclose[d] an entire medium of expression." *Id.* at 49, 53, 55. Similarly, although government

Finally, the fact that Title III prohibits both the "disclosure" and "use" of information does not transform these provisions from direct prohibitions on expression to "laws of general applicability." U.S. Brief at 24-25 (citing *Cohen*, 501 U.S. at 671). Indeed, to avoid a statutory construction that fails to give independent meaning to each relevant provision, Title III's "use" prohibition must be construed as inapplicable to the "disclosure" of information that is the subject of a distinct statutory proscription. *See, e.g., Kungys v. United States*, 485 U.S. 759, 778 (1988); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Because the only issue raised by this case is the Respondents' dissemination of the contents of the Bartnicki-Kane conversation, only Title III's disclosure prohibition is implicated.[19]

Most importantly, however, Petitioners' argument misreads this Court's decision in *Cohen*. That case holds only that a law regulating conduct, which neither purports to prohibit speech nor to single out the press for disfavored treatment, comports with the First Amendment unless its impact on speech is more than "incidental." *See* 501 U.S. at 668-69.

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regulation of commercial speech is typically subject to intermediate scrutiny, this Court will "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 n.9.

[19] *Cf. Fultz v. Gilliam*, 942 F.2d 396, 400 n.4 (6th Cir. 1991) (noting that Title III's distinction "between disclosures and other uses that do not involve actual disclosure . . . leaves uncertain precisely what sort of conduct constitutes 'use'"). Although the issue is not before the Court in this case, Title III's prohibition on the "use" of truthful information about matters of public concern violates the First Amendment even outside the context of its dissemination. *See, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 223 (6th Cir. 1996) (striking down under First Amendment trial court order enjoining *Business Week* from "using" confidential discovery materials that "it obtained unlawfully"); *accord Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 746 (E.D. Mich. 1999); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 262 (E.D. Va. 1995).

Thus, in *Cohen*, this Court rejected a claim that enforcing the law of promissory estoppel in the context of a reporter's broken promise of confidentiality to a source would violate the First Amendment by interfering with the press' ability "to gather and report the news." *Id.*

Whatever relevance *Cohen* may properly have outside this context, it does not preclude application of the First Amendment to a statute that itself contains a direct prohibition of speech, regardless of how "comprehensive" the legislative scheme may otherwise be. *See, e.g., Buckley*, 424 U.S. at 58 (statute that limits contributions and expenditures, used for speech as well as for other purposes, unconstitutional); *Lind v. Grimmer*, 30 F.3d 1115, 1118, 1119 (9th Cir. 1994) (*Cohen* "irrelevant" to statute "intended to impose direct and significant restrictions on speech"). For this reason, the statute at issue in *Butterworth* would not have been saved by the inclusion of a prohibition on the "use" of grand jury information; neither could a listener to the Media Respondents' broadcasts properly be prosecuted for "using" the unlawfully intercepted information in deciding to vote against those School Board candidates who had supported the teachers.

The Government apparently recognizes that its reliance on *Cohen* proves too much, conceding that the First Amendment claim there involved only "an incidental impact on news-gathering and reporting," while this case involves a statute that has "direct application to speech." U.S. Brief at 26 n.8. In short, *Cohen* does not purport to hold that a "generally applicable" prohibition of speech, as applied in the circumstances of this case, is exempted from the *Daily Mail* principle. *See Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972) (distinguishing laws having "incidental" impact on

press from direct legislative "restriction on what the press may publish").[20]

II. AS APPLIED IN THIS CASE, TITLE III DOES NOT VINDICATE AN "INTEREST OF THE HIGHEST ORDER"

Title III's prohibition of the expression at issue can survive constitutional scrutiny under the *Daily Mail* principle only if it is necessary to vindicate a governmental interest of "the highest order." 443 U.S. at 103. As the section that follows demonstrates, *see* Part III *infra*, the statute cannot survive even intermediate First Amendment scrutiny as applied here. Its application in this case violates the First Amendment for the additional reason that, while the "legitimacy and

[20] The individual petitioners make an analogous argument that *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), support the proposition that "the right of the media to gather and report news does not create a privilege to violate laws applicable to all citizens." Plaintiffs' Brief at 16. Neither the Copyright Act nor the common law right of publicity, however, purport to prohibit the dissemination of facts or ideas. Rather, as the Court explained in *Harper & Row*, the "idea/expression" dichotomy at the heart of the Constitution's protection of copyright strikes "'a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting the author's expression.'" 471 U.S. at 556 (citation omitted). Similarly, in *Zacchini*, the Court noted that it is "evident" that the "state law right of publicity would not serve to prevent respondent [television station] from reporting the newsworthy facts about petitioner's act." 433 U.S. at 574. In this case, in contrast, Title III prohibits the dissemination of any information derived from an intercepted communication, including any news report describing its "substance, purport, or meaning." 18 U.S.C. §2510(8). Neither *Harper & Row* nor *Zacchini* turns on a judicial determination that the laws at issue "apply to all citizens" and both cases take pains to emphasize that such laws do not work to prohibit the dissemination of information. *See Harper & Row*, 471 U.S. at 558.

importance of the congressional goal[s]" undergirding Title III cannot be doubted, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), they do not constitute governmental interests "of the highest order" when applied to prohibit truthful speech about matters of public concern.

This Court has heretofore applied the *Daily Mail* principle, and its progenitors, to invalidate a variety of laws that served important governmental interests. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975), the Court recognized that the last "century . . . experienced a strong tide running in favor of the so-called right of privacy," but held that it was insufficient to justify application of a statutory prohibition on the publication of the identity of a rape victim. In *Daily Mail* itself, the Court acknowledged the "'State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.'" 443 U.S. at 104 (citation omitted). Nevertheless, it concluded that the "magnitude of the State's interest" was "not sufficient to justify application of a criminal penalty" to truthful speech about a matter of public concern. *Id.*

In *Florida Star*, the Court considered "highly significant" three governmental interests asserted in support of a statute prohibiting publication of the identity of a rape victim: "the privacy of victims of sexual offenses; the physical safety of such victims, . . . ; and the goal of encouraging victims of such crimes to report these offenses." 491 U.S. at 537. Nevertheless, while the Court expressly refrained from holding that "there is no zone of personal privacy within which the State may protect the individual from intrusion by the press," it concluded that the requisite "state interest of the highest order" was not "satisfactorily served by imposing liability" in *Florida Star*. *Id.* at 541.

Whether "personal privacy" can ever constitute an interest of the "highest order," the Court's case-specific approach to the issue, as well as the genesis of the *Daily Mail* principle

itself, lead to the conclusion that the interests asserted here do not rise to that level. First, this case involves the assertion of a privacy interest, not by the victim of a violent sexual assault, but by participants in a telephone conversation about the public's business. The fact that they hoped, or even expected, that their discussion would remain confidential does not constitute an "interest of the highest order." The analogous common law tort "has long recognized" that "[w]hen the subject matter of the publicity is of legitimate public concern, there is no invasion of privacy," even when the dissemination of allegedly "private" information "would be highly offensive to a reasonable person." *Restatement (Second) of Torts* § 652D, cmt. D (1977).[21] In *Cox Broadcasting*, this Court looked to the *Restatement* and its analogous conclusion that "the interest in privacy fades when the information involved already appears on the public record," to inform its judgment that the plaintiff there had not alleged a privacy interest of sufficient magnitude to overcome "the public interest in a vigorous press." 420 U.S. at 494-95. Where, as here, the information at issue addresses a matter of public concern, whatever privacy interest the individual petitioners possess is similarly not one of the "highest order." *See Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).[22]

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[21] *Accord Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1404 (8th Cir. 1997); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993); *Gilbert v. Medical Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989).

[22] In *Florida Star*, the Court's refusal to "rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim" might satisfy the First Amendment, 491 U.S. at 537, properly reflects the fact that, while such a publication in the context of "'discussion of public affairs'" is protected by the First Amendment, the disclosure of "'purely private'" information for its own sake raises a different constitutional issue, *id.* at 532-33 (quoting *Garrison v.*

Second, *Daily Mail*'s requirement that the Government articulate an "interest of the highest order" in circumstances such as these is based on the premise that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102. The requirement, therefore, flows from the Court's conclusion that the resolution of such cases does not "turn on whether" the prohibition at issue in a given case is viewed as a "prior restraint" or as "a penal sanction for publishing lawfully obtained, truthful information," because "even the latter action requires the highest form of state interest to sustain its validity." *Id.* at 101-02.

Thus, the *Daily Mail* principle recognizes that "infringement upon First Amendment rights may be justified" where the government seeks to prohibit the dissemination of truthful information about matters of public concern, "but only in exceptional cases" such as:

> when the country is at war, when a sovereign seeks to protect the primary requirements of decency by prohibiting obscenity, and when the security of community life is threatened by incitements to acts of violence and the overthrow by force of an orderly government.

Worrell Newspapers of Ind., Inc. v. Westhafer, 739 F.2d 1219, 1223 (7th Cir. 1984) (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *New York Times Co.*, 403 U.S. at 714), *aff'd*, 469 U.S. 1200 (1985). *See also Florida Star*, 491 U.S. at 532 (declining "to hold broadly that truthful publication may never be punished consistent with the First Amendment"

Louisiana, 379 U.S. at 72). The Court's reference to the "nonconsensual acquisition" of "sensitive information," 491 U.S. at 534, similarly reflects a recognition that the publication of unlawfully acquired private facts unrelated to a matter of public concern does not necessarily shelter under the *Daily Mail* principle.

because of possible "future . . . scenarios" such as "'publication of the sailing dates of transports or the number and location of troops'") (quoting *Near*, 283 U.S. at 716). None of the interests asserted in support of Title III's application in this case "reach[es] the level" contemplated by this Court in *Daily Mail*.

III. AS APPLIED IN THIS CASE, TITLE III DOES NOT SURVIVE INTERMEDIATE SCRUTINY

Even assuming that the *Daily Mail* principle does not govern this case, Title III's application here does not satisfy any level of heightened First Amendment scrutiny, including the "intermediate" scrutiny urged by the Government. As articulated by this Court in *United States v. O'Brien*, 391 U.S. at 376, intermediate scrutiny inquires whether the governmental action at issue "furthers an important or substantial governmental interest," whether that interest is "unrelated to the suppression of free expression," and whether the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Put differently, intermediate scrutiny requires an examination of whether the statute at issue is "narrowly tailored to serve a significant governmental interest," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), whether "the recited harms" identified by the legislature "are real, not merely conjectural," whether application of the challenged "regulation will in fact alleviate these harms in a direct and material way," *Turner Broadcasting Sys. v. FCC*, 512 U.S. 662, 664 (1994), and whether the burden the regulation places on speech is "substantially broader than necessary" to vindicate the interest asserted, *Ward*, 491 U.S. at 800.

A. Title III's Dissemination Prohibition Is Directed To The Suppression Of Free Expression

On its face, Title III purports to preclude the dissemination of information, not to regulate conduct as in *O'Brien* or the "time, place or manner" in which speech can take place, as in *Ward*. Its restrictions on speech are not, as the *O'Brien* test presupposes, "incidental"—they are both direct and absolute. And, they are justified, in substantial part, by the Government's asserted interest in "protect[ing] against the aggravated injury to privacy that occurs when illegally intercepted communications are then exploited or publicly disseminated." U.S. Brief at 13-14. This interest is directly "[]related to the suppression of free expression," *O'Brien*, 391 U.S. at 377, because it seeks to protect against harm caused by dissemination of the contents of assertedly "private" communications to third parties.

As this Court recognized in *Buckley*, where even one interest served by legislation "involve[s] 'suppressing communication,'" the *O'Brien* standard cannot be satisfied. 424 U.S. at 17. There, the "interests served" included "restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." *Id.* The Court held that, unlike *O'Brien*, where the government's interest "in the preservation of draft cards was wholly unrelated to their use as a means of communication," the asserted interest in *Buckley*, even if the expenditure of money at issue there was deemed to be "conduct" and not "speech," "'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'" 424 U.S. at 17 (quoting *O'Brien*, 391 U.S. 382). Thus, the Court held, the statute would fail intermediate scrutiny under *O'Brien*. *See* 424 U.S. at 17.

In this case, where the Government seeks to apply Title III to those who engaged in no unlawful conduct, its interest is

focused squarely on "the communication" and it arises precisely because the communication is "itself thought to be harmful." *Id.*; *see* 1968 S. Rep. 90. As in *Buckley*, the Government's asserted interest in this case "involve[s] 'suppressing communication,'" and it therefore fails intermediate scrutiny under *O'Brien*. 424 U.S. at 17.

B. As Applied In This Case, Title III Does Not Advance The Government's Asserted Interests In A Direct And Material Way

The Government necessarily contends that application of Title III to the dissemination of information addressing matters of public concern, by those who engage in no unlawful conduct to acquire it, is "essential" to further its asserted interests. *See* U.S. Brief at 13-14. That contention finds no support in the legislative history and is based entirely on "assertion and conjecture." *Landmark*, 435 U.S. at 841. The Government, therefore, cannot meet its burden of demonstrating that "'the regulation will in fact alleviate these harms in a direct and material way.'" *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (citation omitted).

At issue here is application of the statutory prohibition to dissemination of accurate information about matters of public concern by those who played no role in the interception itself. There is no suggestion in the legislative history that Congress determined that application of Title III in these circumstances serves to advance the asserted interests. Indeed, there is precious little discussion about sections 2511(1)(c)&(d) at all and even less about their role in prohibiting private parties, rather than the government itself, from using and disclosing the contents of unlawfully recorded communications.[23]

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[23] *See* pp. 2-3 *supra*. The Government attempts to find support for the contrary proposition in the 1968 Senate Report's passing observation that

"Particularly in the light of the absence of any detailed findings by Congress," it is difficult to conclude that Title III's application to expression of the kind at issue here is "narrowly tailored if that requirement has any meaning at all." *Reno*, 521 U.S. at 879. This is especially so where, as here, the statute is directed primarily at a different problem and its attempt to address both governmental and private eavesdropping in a single statutory scheme is so riddled with exceptions, *see* note 2 *supra*, that it has resulted in a law the construction of which "is fraught with trip wires." *Forsyth v. Barr*, 19 F.3d 1527, 1543 (5th Cir. 1994); *see United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998) ("When the Fifth Circuit observed that the Wiretap Act 'is famous (if not infamous) for its lack of clarity' it might have put the matter too mildly.") (quoting *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 462 (5th Cir. 1994)). *See also Florida Star*, 491 U.S. at 540 (exceptions to statutory proscription "raise[ ] serious doubts about whether Florida is, in fact, serving . . . the significant interests" it asserts).

To the extent that Congress did consider communications unlawfully intercepted by private parties, its attention was not on accurate, newsworthy information, but rather on trade secrets and the details of matrimonial discord. *See* pp. 3, 5 &

"'[o]nly by striking at all aspects of the problem can privacy be adequately protected.'" U.S. Brief at 5 (quoting 1968 S. Rep. 69). The quoted passage, however, reflects a focus by Congress not on one who disseminates information, but on an entirely different player:

> It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture, and advertising *of intercepting devices*. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy adequately be protected.

1968 S. Rep. 69 (emphasis added).

notes 3, 5 *supra*.[24] In fact, Congress recognized that dissemination of information about matters of public concern serves important purposes and should not be inadvertently prohibited by Title III. *See* 1986 H. Rep. 39-40 (prospect that Title III would be "violated by interceptions made in the course of otherwise responsible newsgathering" is "inconsistent with the guarantees of the First Amendment").

The Government's failure to distinguish between accurate information about matters of public concern, which is entitled to the full protection of the First Amendment, on the one hand, and proprietary or purely private information, on the other, distorts its application of intermediate scrutiny in material ways. Thus, the Government asserts that the legislative purpose in prohibiting the dissemination of intercepted communications can be analogized to the deterrent effect of statutes that sanction the possession of child pornography or that prohibit the receipt of stolen property. *See* U.S. Brief at 40-41. Reliance by Petitioners on *Osborne v. Ohio*, 495 U.S. 103 (1990), and *New York v. Ferber*, 458 U.S. 747 (1982), *see* U.S Brief at 40-41, Plaintiffs' Brief at 37-38, is misplaced, however, because the statutes at issue in those cases regulated child pornography, a category of speech that, unlike the truthful expression about matters of public concern at issue here, is not entitled to protection under the First Amendment at all, *see, e.g., Ferber*, 458 U.S. at 763-64.

[24] The Government, albeit not in this Court, has effectively conceded as much, explaining that the Florida couple that intercepted the telephone "conference call among Speaker of the U.S. House of Representatives Newt Gingrich and other Members of Congress" at issue in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709), would only be charged with an "infraction," which resulted in a $500 fine, in significant part because the interception was not undertaken "for purposes of direct or indirect commercial advantage or private financial gain." Department of Justice, Press Release, Apr. 23, 1997, at 1. A search of the Westlaw database indicates that, of the approximately 160 reported decisions concerning alleged violations of the interception, disclosure and use provisions of Title III from 1968 through October 21, 2000, some 75% arose in either the law enforcement, commercial or domestic relations contexts. *See* Appendix *infra*. *See also* Milo Geyelin & Christi Harlan, *Lawyer is Convicted of Employing Evidence Wiretapped by His Client*, Wall St. J., Oct. 22, 1991, at B10 (reporting that "nearly 80% of illegal electronic surveillance, including wiretapping, occurs in divorce cases").

Similarly, the Government's analogy to statutes criminalizing the receipt of stolen goods overlooks both the dispositive constitutional distinction between wholly unprotected conduct and the protected speech at issue here, and the fact that, because money drives the market for stolen goods, eliminating the buyer will of necessity have a direct impact on the seller in that context. While the analogy may be apt in circumstances actually considered by Congress—such as commercial espionage—in which money provides a financial incentive for disclosure, *see* U.S. Brief at 24, there is no basis to contend, and Congress certainly did not purport to conclude, that the same incentives apply to the dissemination of information about matters of public concern.

The Government makes the same error when it contends that Title III's prohibition on the dissemination of information is essential because those who unlawfully intercept communications are difficult to identify and prosecute. This observation may be accurate as applied to the practitioners of industrial espionage and the like, although the reported prosecutions and civil actions alleging violations of Title III's interception provision at least raise legitimate questions about even that.[25] Such a contention is, however, purely speculative in the context of the dissemination of information about

[25] Indeed, of the 63 reported decisions addressing alleged violations of 18 U.S.C. §§ 2511(1)(c)&(d), in only five is there any suggestion that the identity of the interceptor could not be ascertained. *See* Appendix *infra*.

matters of public concern, as demonstrated by the facts of all three relevant cases recently decided by the courts of appeals. In *Boehner v. McDermott*, the Florida couple that intercepted the telephone conference call at issue there was both identified and prosecuted. In *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), the neighbor who intercepted the cordless telephone calls at issue there was identified as well. And, in this case, although Bartnicki and Kane both advised the local District Attorney that they believe they know who intercepted their conversation, he declined to "expend significant resources" on the matter. Olszewski Dep. 38. The Government's attempt to justify the statute as a "loophole closing provision" that is necessary "to prevent circumvention" of its prohibition on interception, cannot therefore be squared with the First Amendment. *Buckley*, 424 U.S. at 44; *see United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1895 (2000) (Thomas J, concurring) ("The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government.").

Petitioners' "related" argument—that Title III's prohibition on the dissemination of information in these circumstances reflects Congress' interest in "foster[ing] development of new technologies, such as cellular phones, . . . by assuring the public that [they] will be as secure as the mails," U.S. Brief at 14—is doubly flawed. First, the explosive growth of technologies such as wireless and cordless telephony—both before and after Congress acted to declare that its users have an enforceable expectation of privacy—cannot be disputed.[26]

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[26] *See* Hull, *supra* note 4, at 130. Prior to 1986, several courts had held that the users of cellular telephones did not have a reasonable expectation of privacy in such communications. *See, e.g., Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 539 (5th Cir. 1987). Despite the absence in the context of cellular telephony of the "high level of protection" afforded to first class mail, "American citizens and American businesses [we]re using these new forms of technology in lieu of, or side-by-side with, first class mail and common carrier telephone services." 1986 S. Rep. 5.

This growth rebuts the speculative contention that the possibility that such communications may be intercepted (much less that their contents may be disseminated when they reveal matters of public concern) will have a material impact on either the continued development of such technologies or on the eagerness of consumers to make use of them. Indeed, this Court addressed a virtually identical contention in *Reno*, 521 U.S. at 885, where the Government similarly argued that the Communications Decency Act was necessary to "foster[] the growth of the Internet." The Court properly found the argument to be "singularly unpersuasive," *id.*, a conclusion equally applicable to the analogous contention here with respect to "cellular phones, e-mail, and other computer communications," U.S. Brief at 14:

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

521 U.S. at 885.

Second, the Government's interest in "assuring" that wireless telephony is "as secure as the mails," U.S. Brief at 14, cannot reasonably encompass Title III's prohibition on the dissemination of information for the simple reason that there is no analogous prohibition contained in the "elaborate system of regulation" that surrounds the postal service. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453

U.S. 114, 123 (1981). Although federal law prohibits both the theft of mail and the obstruction of correspondence sent via the Postal Service, *see* 18 U.S.C. §§ 1702, 1708, it does not prohibit the disclosure or other use of its contents by private parties, nor does it authorize a private right of action in such circumstances. *See, e.g.*, *Sciolino v. Marine Midland Bank-Western*, 463 F. Supp. 128, 130-31 (W.D.N.Y. 1979). Indeed, unlike Title III, the statutory scheme governing the mails prohibits the "receipt" and "possession" of unlawfully acquired mail, although only when the recipient "know[s] the same to have been stolen." 18 U.S.C. § 1708. Moreover, under the statutory prohibition of "obstruction of correspondence," a person "who received stolen mail but who did not participate in the theft cannot violate" the statute in any event. *United States v. Ashby*, 771 F.2d 392, 393-94 (8th Cir. 1985) (construing 18 U.S.C. § 1702).[27] Despite the failure of Congress to prohibit dissemination of the contents of unlawfully acquired mail, "the Postal Service is so much a fact of our daily lives that the mail patron watching for the mailtruck, or the jobholder returning from work looking in his letterbox before he enters his house, are commonplaces of our society." *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 124; *see Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 758

[27] The Government suggests that, because "electronic intrusions into modern communications—unlike intrusions into letters—can be accomplished without the physical access that ordinarily permits prevention and detection, the need for legal protection against unauthorized disclosure in this context is even greater." U.S. Brief at 37. There is no support for this proposition, and the Government offers none. Indeed, press accounts suggest that modern law enforcement is equally well equipped to investigate the clandestine theft of a letter from a mailbox and the work of a computer hacker. *See, e.g.*, David Johnston, *17-Year Search, an Emotional Discovery and Terror Ends*, N.Y. Times, May 5, 1998, at A24; Chris Taylor, *How They Caught Him; Tracking the Hacker Who Hatched the Melissa Virus*, Time, Apr. 12, 1999, at 66.

(1996) (opinion of Breyer, J.) ("we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not 'essential'").[28]

C. Title III Is Not Narrowly Tailored To Further The Asserted Interests Without Prohibiting The Dissemination Of More Speech Than Is Necessary

The Government has also failed to provide any support for its contention that the statutory prohibition on dissemination, as applied to the publication of a newsworthy matter of public concern by an innocent recipient of the communication, is narrowly tailored to further the asserted governmental interests without "burden[ing] substantially more speech than is necessary." *Turner Broadcasting Sys.*, 512 U.S. at 662. In fact, Title III does not simply "burden," it *prohibits* more speech than is "necessary" or "essential" to achieve the asserted legislative purposes. *See Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 216 (1997) ("'[T]he essence of narrow tailoring [is] focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils.'") (citation omitted).

[28] Similarly, although "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979), neither Congress nor the judicial branch has deemed it "necessary" to protect the secrecy of such proceedings by prohibiting the disclosure of "matters occurring before the grand jury" by persons other than the participants themselves, Fed.R.Crim.P. 6(e). While such persons acquire information in the first instance with the understanding that they may not lawfully disclose it, and may therefore be prosecuted for violating that trust, *see, e.g.*, *In re Sealed Case*, 192 F.3d 995 (D.C. Cir. 1999), there is no analogous prohibition on the dissemination of information about grand jury proceedings by others, including the press, *see, e.g.*, *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997); *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990).

First, the legislative history not only fails to articulate any basis for the Government's contention that prohibiting dissemination in this context is essential to preventing unlawful interception in the first instance, it cannot reasonably be squared with Congress' decision to limit to a nominal fine the criminal penalties to be imposed on those who, in circumstances such as these, in fact intercept protected communications. *See* 18 U.S.C. § 2511(4)(b)(ii); *see also Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). Enhancement of those criminal penalties to include at least the prospect of incarceration would, it can reasonably be assumed, have a more direct impact on illegal interceptions than the prohibition on dissemination at issue here. *See, e.g., Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *3 (D.D.C. July 28, 1998) (subsequent history omitted) (deterrent value of $500 fine imposed on interceptors in that case was "almost laughable").

Second, Congress may require, or provide legislative incentives for, the development of new technologies that serve to prevent interception. *See, e.g.*, 47 U.S.C. § 1002. Indeed, interception of calls made on the cellular telephone used by Bartnicki in this case, which employed wireless technology that is rapidly becoming obsolete, would not have been possible if the signal had been sent digitally.[29] Similarly,

[29] Time Division Multiple Access service, for example, permits a cellular service provider "to divide up the signal into tiny fractions of a second . . . which greatly reduces any chance for the radio hobbyist to intercept cellular telephone conversations." Fred Ulricht, *All-digital Cellular Provides Greater Security*, Birmingham Bus. J., Nov. 16, 1998, at 15. The Global System for Mobile Communication uses a 64-bit encryption algorithm (reduced to 56 bits by some service providers) to enhance voice privacy. Ann Harrison, *Cellular Phone Encryption Challenged*, Computerworld, May 24, 1999, at 67. Almost 50% of all U.S. subscribers currently have digital cellular service. "Frequently Asked Questions and Fast Facts," at http://www.wow-com/consumer/faqs/faq general.cfm (visited Oct. 16, 2000).

Congress could require, or provide incentives for the wireless telephone industry to manufacture voluntarily, equipment that has the capacity to encrypt wireless calls so that they may not be intercepted. *See, e.g., Shubert v. Metrophone, Inc.*, 898 F.2d 401, 403, 405 (3d Cir. 1990). By the same token, Congress may legislate to create disincentives for the creation of technologies that permit interception, such as authorizing private actions against those who manufacture or sell scanners and other interception devices. *See, e.g., Flowers v. Tandy Corp.*, 773 F.2d 585, 589 (4th Cir. 1985).

Most importantly, Title III's lack of narrow tailoring results in the prohibition of too much speech. On its face, the statute prohibits the dissemination of information derived from an intercepted communication even when it has already been broadly disseminated. The Government is undoubtedly correct that Congress did not intend this result, *see* U.S. Brief at 44 (citing 1968 S. Rep. 93); indeed, the legislative history similarly contains no suggestion that Congress intended to prohibit the dissemination of truthful information about matters of public concern, *see* pp. 3, 5 *supra*. The fact remains, however, that the statute as written applies in both circumstances and prohibits the dissemination of information that is already "public information." In this case, several members of the School Board, as well as other news organizations, had either heard the tape or had been informed of its contents *prior to* the time the Media Respondents shared them with the rest of the community. Application of Title III in these circumstances violates the First Amendment. *See Cox Broadcasting*, 420 U.S. at 496.

In addition, Title III applies not only when any privacy interest has "fade[d]" because the information "already appears on the public record," *Florida Star*, 491 U.S. at 532 n.7, but also when there is no privacy interest at all. In this regard, Title III creates an unrebuttable presumption that the participants in wireless and cordless telephone conversations have a reasonable expectation of privacy in them. *But see* p. 4 *supra*. Thus, Title III authorizes a participant in such a conversation who has no expectation of privacy at all – because he makes the call in a public place where he knows it will be overheard, or voluntarily repeats its contents to others – to maintain a civil action against a third party who has reason to believe it was illegally intercepted. Indeed, in this case, Kane testified that he believes "everything we do is taped" and Bartnicki received express warning from her cellular provider that her calls could be intercepted. *See* p. 11 *supra*. Nevertheless, Title III authorizes them to sue for statutory damages, despite the fact that they do not claim in this case that they suffered any "actual injury." *See Gertz v. Robert Welch, Inc.* 418 U.S. 323, 349-50 (1974).

In this case, moreover, the district court held that the statutory prohibition on dissemination is applicable to persons whose only "reason to know" that a communication has been unlawfully intercepted is the unadorned fact that a tape recording of it exists and it contains information about matters of public concern that the participants would prefer not be made public. *See* App. 10a. [30] As even the district

[30] As the district court's decision in this case illustrates, the lower courts have not embraced the Government's proposed construction of the statute's "reason to know" requirement. *Compare* U.S. Brief at 45 ("reason to know" implies no duty to "investigate or to discover additional facts") (citing *Restatement (Second) of Torts* § 12 cmt. a (1965)) *with* App. 10a (district court decision quoted in text *supra*). *See also Peavy*, 221 F.3d at 178-79; *United States v. McIntyre*, 582 F.2d 1221, 1225 (9th Cir. 1978); *Williams v. Poulos*, 11 F.3d 271, 284 (1st Cir. 1993).

court recognized, however, in this case "there exists a great likelihood that the conversation was inadvertently intercepted and recorded," App. 64a, which would render the interception itself, and the Media Respondents' subsequent dissemination of its contents, entirely lawful. *See, e.g., Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 742-43 (4th Cir. 1995). Nevertheless, the fact that the Media Respondents could not eliminate the possibility that the conversation was unlawfully intercepted placed them in jeopardy of violating the statute and deters them—and those similarly situated—from speaking even in those instances when the interception itself turns out to be entirely lawful.

Under the "reason to know" standard, any person who heard the recording at issue on the radio and then disclosed a portion of its contents across the dinner table would have as much "reason to know" it had been intercepted unlawfully as did the Media Respondents here. The statutory prohibition applies to dissemination of "the substance, purport or meaning" of the intercepted conversation, not simply playing the tape recording of it verbatim. 18 U.S.C. § 2510(8). Accordingly, beyond Yocum's transmission of the recording to the Media Respondents, and their dissemination of its contents to the public, Title III also prohibits Yocum's efforts to alert members of the School Board that they might be in danger, as well as the Board's subsequent discussion of the issue. "Not only is this not narrow tailoring, this is not tailoring of any sort." *Boehner*, 191 F.3d at 485 (Sentelle, J., dissenting).

And, even if Title III is not deemed to be "content based" on its face, it undeniably affords civil litigants and criminal prosecutors alike discretion to invoke it in an invidious manner. *See Butterworth*, 494 U.S. at 635-36. As this case illustrates, the individual petitioners have instituted civil litigation against the Media Respondents – and not other media outlets whose coverage they "appreciated" – in

substantial part because they object to the criticism of their conduct expressed by Vopper during his broadcasts and believe that such criticism injured their reputations. *See* pp. 10-11 & note 12 *supra*. Even laws of general application cannot properly be invoked in this manner to circumvent the First Amendment protections articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). A statutory scheme that is directed at expression itself and permits the same result "burden[s] substantially more speech than is necessary." *Ward*, 491 U.S. at 799.

Finally, there is no merit to the Petitioners' contention that "'constitutionally protected interests lie on both sides of the legal equation.'" U.S. Brief at 27 (quoting *Nixon*, 120 S. Ct. at 911 (Breyer, J. concurring)). The First Amendment protects against governmental action, not the action of private parties. *See e.g., Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). Thus, the First Amendment would typically prohibit the legislature from enacting laws that compel the disclosure of communications by those who wish to keep their contents secret. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (New Hampshire may not "constitutionally *require* an individual to participate in the dissemination of an ideological message") (emphasis added). It does not, however, provide a *constitutional* basis for government to prohibit others from speaking. *See Turner Broadcasting Sys.*, 512 U.S. at 685 (O'Connor, J., concurring in part, dissenting in part) ("it is government power, rather than private power, that is the main threat to free expression").

That is the lesson of *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974), in which this Court rejected the contention that an "interest," purportedly derived from the First Amendment, in securing access to newspapers justified a Florida statute that compelled "editors or publishers to publish that which reason tells them should not be published."

The vice of the statute at issue in *Tornillo* was that it sought to achieve its ends through "governmental coercion" of some speakers. *Id.* at 254. For the same reason, although Congress may otherwise legislate to protect the right "'*not* to speak publicly,'" *Harper & Row*, 471 U.S. at 559 (citation omitted), it may not do so by affirmatively coercing others to remain silent.[31] "Regardless of how beneficent-sounding the purposes of controlling" speech may be, in this context, as in all others, we "remain intensely skeptical about those measures" that would "make the government the censor of what the people may read and know." *Tornillo*, 418 U.S. at 259-60 (White, J., concurring).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[31] *Harper & Row* is not to the contrary. There, the Court considered the unique role of the Copyright Act, which embodies rights granted by the Constitution itself, *see* 471 U.S. at 558 ("the Framers intended copyright itself to be the engine of free expression"), and does so in a manner that "'strike[s] a definitional balance'" that incorporates First Amendment interests, *id.* at 556 (citation omitted). Indeed, the Court in *Harper & Row* emphasized that the limited "right not to speak" embodied in the Copyright Act would not "sanction abuse of the copyright owner's monopoly as an instrument to suppress facts." *Id.* at 559.

APPENDIX

APPENDIX

18 U.S.C. § 2511(1)(a)

1. *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976 (7th Cir. 2000).
2. *Alire v. Bell*, 100 F.3d 967 (10th Cir. 1996).
3. *Amati v. City of Woodstock*, 829 F. Supp. 998 (N.D. Ill. 1993).
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No. 99-1687, 99-1728

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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I. STRICT SCRUTINY IS NOT WARRANTED

A. Telephone conversations and other communications covered by the statutes involved here concern every topic under the sun; and the statutes apply without regard to the viewpoints expressed or the subjects addressed by either the person who makes an intercepted communication or the person who discloses that communication. Thus the statutes are entirely free of content discrimination: they apply to a disclosure not because of the subject it addresses, but because it stems from an unlawful interception.

1. In an argument that amounts to little more than a play on words, respondents maintain that the statutes nevertheless should be considered "content-based" because liability turns on examining the "contents" of the radio broadcasts to determine whether an intercepted communication was disclosed. *See* Brief for Respondents Frederick W. Vopper, *et al.* ("Vopper Br.") 25 n.16; Brief for Respondent Jack Yocum ("Yocum Br.") 47-48. That contention is refuted by the numerous cases in which this Court has *not* applied strict scrutiny to statutes and orders under which liability turned on the contents of speech. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

A law is not "content-based" merely because one must examine the contents of a communication to determine whether the law has been violated. *See Hill v. Colorado*, 120 S. Ct. 2480, 2485, 2491-93 (2000). Rather, a law is subject to strict scrutiny as content-based only if it discriminates with respect to *viewpoints*, or if it "place[s] a prohibition on discussion of *particular topics*, while others [a]re allowed." *Id.* at 2493 (emphasis added). *See* Brief for Petitioners Bartnicki and Kane ("Pet. Br.") 21-24.

The content-discrimination cases cited by respondents and their *amici* all fall into that category. In *Boos v. Barry*, 485 U.S 312, 316 (1988), the statute applied only to speech critical of a foreign government. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the fee for a parade permit was based on the extent to which an applicant's message was considered unpopular. In *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984), the statute was confined to "editorial opinion on 'controversial issues of public importance.'" In *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 and n.2 (1974), the statute applied only where a newspaper had assailed a candidate's personal character or official record. In *Butterworth v. Smith*, 494 U.S. 624 (1990), the statute applied only to information relating to the government's attempt to secure an indictment. In *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 116-118 (1991), the statute applied only to works by a criminal concerning his crime. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), the statute applied only to magazines of commercial content, on the theory that commercial articles are of "low[er] value" than articles on other subjects. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), the law favored magazines that discussed only sports, religion, and professional topics. In *Burson v. Freeman*, 504 U.S. 191, 197 (1992), the application of the statute "depend[ed] entirely on whether . . . speech wa[s] related to a political campaign." The same was true in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

Although in some of those cases the statutory restrictions applied to an entire category of subjects rather than to a single narrow topic, the statutes' selectivity nevertheless was such as to implicate the concern that underlies the content-neutrality doctrine—that, by restricting discussion of certain subjects, the government may be seeking to limit disfavored messages and thus to engage in "invidious thought-control."

Hill, 120 S. Ct. at 2493 (opinion of the Court) (quoting *id.* at 2504) (Scalia, J., dissenting). *See, e.g., FCC v. League of Women Voters*, 468 U.S. at 384 ("Congress appears to have sought . . . to limit discussion of controversial topics and thus to shape the agenda for public debate.")[1]

2. Similarly incorrect is respondents' theory that a law must be considered content-based if one of its concerns is the "communicative impact" of particular speech. Yocum Br. 48. *See also id.* at 24, 43; Vopper Br. 25 n.16. In *Seattle Times*, the challenged protective order was based on a determination "that dissemination of th[e] information would 'result in annoyance, embarrassment and even oppression,'" 467 U.S. at 37; but strict scrutiny was not applied. In *Harper & Row*, *Zacchini* and *San Francisco Arts & Athletics* as well, it was the substance of the prohibited communications that caused the harm the statutes were designed to avoid. That a restriction applicable to speech is based in part on avoiding the harm such speech would cause does not mean that the law warrants strict scrutiny, if the law is neutral as to both viewpoint and subject matter. *Cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) ("a regulation neutral on its face may be content based if its manifest

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[1] Similar concerns arise where the government seeks to dictate what information about its own activities may be published. That is the situation Professor Bickel characterized as giving rise to a "contest" between the government and the press. *See* Alexander M. Bickel, *The Morality of Consent* 68, 79-82 (1975). Of course, the case Professor Bickel described as exemplifying that "contest"—*New York Times Co. v. United States*, 403 U.S. 713 (1971)—was confined to the question of prior restraint. *See* Pet. Br. 19.

The suggestion that these statutes are content-based because they are "hostile to messages that contain private content," Yocum Br. 49, misses the mark. An unlawfully intercepted communication is covered by the statutes without regard to whether it deals with a particularly "private" subject. This is why the statutes differ from the tort of "public disclosure of private facts." *See infra* at 7-8 and n. 8.

purpose is to regulate speech because of *the message it conveys"*) (emphasis added). [2]

Furthermore, these statutes do not single out speech for any prohibition that does not apply to other uses of intercepted communications. *See* Pet. Br. 20-21. The debate whether, absent the specific disclosure prohibition in § 2511(1)(c), the "use" prohibition in § 2511 (1)(d) would have been construed to include disclosure, *see* Vopper Br. 28; Yocum Br. 45, misses the point: what matters is that, under these statutes, "disclosure" is treated *exactly the same* as any and every "use." *Compare, e.g., Simon & Schuster*, 502 U.S. at 119-120 (noting that the New York statute covered only profits of

[2] In cases involving the "secondary effects" doctrine, the application *vel non* of strict scrutiny may turn on whether the justification for a law is grounded in the impact of particular speech. That is because the doctrine comes into play where the government seeks to justify a law that "applie[s] only to a particular category of speech." *Boos v. Barry*, 485 U.S. at 320. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1882, 1885 (2000) (law applied only to television channels "primarily dedicated to sexually-oriented programming"). In that situation, if the argument is advanced that the facial non-neutrality of the law should not trigger strict scrutiny because "[the] *justification* [for the law] had nothing to do with [the affected] speech," *Boos*, 485 U.S. at 320 (emphasis added), the argument will fail if the justification for the law is in fact the communicative impact of the targeted speech. *See id.* (impact of criticism on foreign officials is not a "secondary effect" justifying a law restricting criticism of foreign governments).

A similar analysis applies where the question is raised whether a law that operates to restrict particular forms of expression may be justified as regulating *conduct*. *See City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000) (nude dancing); *United States v. Eichman*, 496 U.S. 310 (1990) (flag desecration); *Texas v. Johnson*, 491 U.S. 397 (1989) (same); *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (political expenditures). In all of those cases, the laws affected expression *only on certain subjects*. Consequently, a finding that the justification for the law was the harm caused by expression rather than by conduct properly would lead to the conclusion that the law was content-based. This is not such a case.

a crime obtained through publication rather than through other activities).[3]

B. None of the limited sets of circumstances that have been held to warrant strict scrutiny of *content-neutral* laws is present here.[4] For example, the cases invalidating selective taxation of newspapers, emphasized by several of the *amici*, involve *speaker*-discrimination, and "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect *when it threatens to suppress the expression of particular ideas or viewpoints*." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (emphasis added).

In the rare cases where a content-neutral statute has been closely scrutinized because it "suppress[es] too much speech," *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), the Court's concern has been "with laws that foreclose an entire medium of expression." *Id.* Even there, the concern has been limited to modes of expression that are "uniquely valuable or important." *Id.* at 54 (distinguishing bans on residential signs from bans on signs on public property).[5] Prohibiting

[3] Furthermore, the prohibitions involved here, to the extent that they apply to disclosures, are not justified solely by reference to the harm caused by disclosure, but also by the judgment that prohibiting disclosure and other uses will deter interception in the first place. *See* Pet. Br. 37.

[4] Several of the decisions cited by petitioners in this connection involved laws that were *not* content-neutral. For example, the statute in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 831 (1978), applied only to speech about charges of judicial misconduct. Laws limiting speech relating to an election, *see Buckley v. Valeo*, 424 U.S. 1 (1976) and *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000), can be seen as content-based. *See Burson, supra*; *McIntyre, supra*. They also present the separate problem discussed in note 5, *infra*.

[5] Laws limiting the amount of speech allowed in connection with an *election*, in addition to being content-based, *see supra* note 4, constitute a category where "quantity restrictions" on speech are of special concern. *Buckley*, 424 U.S. at 17-19, 39. *See also Meyer v. Grant*, 486 U.S. 414, 421-423 (1988) (noting that restrictions on circulation of initiative petitions may limit the ability to effectuate political change).

disclosure of unlawfully intercepted communications has nothing in common with those cases.

Respondents' suggestion that a law, no matter how content-neutral, must be subjected to strict scrutiny whenever it is applied to prohibit truthful speech on a matter of public concern has no basis in this Court's jurisprudence. *See, e.g.*, Vopper Br. 19. In the cases cited as support for that proposition, the Court was addressing laws that allowed the imposition of liability—generally by a jury—based on *disagreement with a speaker's message*. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) ("libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (to allow a jury to impose liability under "an 'outrageousness' standard" would allow them to do so "on the basis of [their] tastes or views, or perhaps on the basis of their dislike of a particular expression"); *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967) (New York privacy statute allowed liability for "fictionalization," based on findings of "factual errors, distortions and fanciful passages").[6]

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[6] Respondents claim that "the restrictions in this case are in fact being applied in a content-based manner," Yocum Br. 49, because petitioners sued only these respondents, and not members of the media who subsequently discussed what Vopper had broadcast. *See* Vopper Br. 10, 13, 47-48; Yocum Br. 3, 10. That does *not*, however, represent a distinction based on the viewpoionts expressed by the various media entities. Rather, these respondents were sued for the simple reason that they, and only they, caused the intercepted communication to be broadcast. *See* Pet. Br. 6 n.2. In any event, it always is possible that disagreement with a speaker's message may play a part in causing a plaintiff to seek enforcement of a law the speaker has violated. (In defamation litigation, for example, that is *always* the case.) What matters is not a plaintiff's motive for filing suit, but whether the *standards of liability* turn on judgments about the defendant's message. That is not the case under these statutes. Indeed, the complaint in this action does not even refer to any statements made by the respondents regarding the taped conversation or anything else. All that is alleged is that Yocum "intentionally disclosed the tape" and that Vopper "intentionally disclosed and published to the public the entire contents of the private telephone conversation." JA 26-27.

Whatever level of scrutiny may be triggered by the application of *message-discriminatory* laws to truthful speech on matters of public concern,[7] there is *no* doctrine holding that truth is a defense, or even a trigger of strict scrutiny, where a *content-neutral* restriction is being applied. Cases such as *Seattle Times* and *Harper & Row* are quite to the contrary. And, in *Time, Inc. v. Hill*, the Court was careful to note that its holding with respect to the need to protect truthful speech from liability based on claims of "fictionalization" did not "intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices." 385 U.S. at 385 n.9. *See also Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 489 (1975) (distinguishing privacy torts that base liability on whether publicity is "offensive" by virtue of its subject matter from claims arising out of "a physical or other tangible intrusion into a private area").[8]

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[7] This Court's decisions in the defamation cases do not articulate a standard of strict scrutiny, but rather seek to strike an "accommodation of the competing values at stake." *Gertz*, 418 U.S. at 348. In that context the government has only been required to show that a challenged law properly promotes a "legitimate" state interest. *Id. See also Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 757 (1985) (opinion of Powell, J.).

[8] Respondents observe that the tort doctrine of "public disclosure of private facts" does not impose liabililty for the publication of facts of public concern. *See* Vopper Br. 32; Brief *Amicus Curiae* of Dow Jones & Company at 15-19. That is simply because the gravamen of the tort is that information disclosed by the defendant was of such an intensely private nature that reasonable people would be offended by its publication. *See* Restatement (Second), Torts, § 652D. If the facts disclosed are public in nature, a "disclosure of private facts" claim fails because the facts are not

Counsel for one of the *amici* has elsewhere explained why protection of truthful speech is not the only value to be taken into account where interests of personal autonomy are at stake:

> [W]hen government acts to limit the untrammeled gathering, recording, or dissemination of data or statements about an individual, of course it inhibits speech—but it also vindicates the individual's ability to control what others are told about his or her life. Such control constitutes a central part of the right to shape the "self" that any individual presents to the world.
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> There can be no escape from continuing efforts to accommodate the value of uninhibited public discussion with the value of preserving control for individuals over what is known and said about them by and to others.
>
> Finally, there comes a point at which only this latter value plays a significant role in a case—at which such public discussion as occurs is wholly parasitic upon a clear invasion of an individual's right to retain control over personal information. Nothing in the Court's defamation decisions, and nothing in the three decisions coming closest to addressing the conflict between speech and privacy, remotely suggests that, when this point is reached, government must exalt an abstract right to know, here reduced to a right to gossip, above the deeper concerns of personhood.

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so "private" that publication is "regarded as beyond the pale of propriety." Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). There is, however, no comparable common law doctrine that material obtained *through intrusion into private places* is fair game merely because the information is of public interest. *See, e.g., Shulman v. Group W. Productions, Inc.*, 955 P.2d 469, 494 (Cal. 1998) ("tapping a personal telephone line . . . could rarely, if ever, be justified by a reporter's need to get the story. Such acts would be deemed highly offensive even if the information sought was of weighty public concern.")

* * * *

> Both accommodating free speech values with those of informational autonomy, and defining the point at which only the latter are at stake, involve difficult judgments of degree. One helpful consideration, at least, is the extent to which the harm done by a statement is truly of a sort that "more speech" could not possibly cure.
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> In cases involving clear breaches of privacy, . . . the very idea that more talk could do anything but add insult to injury betrays a misunderstanding of the character of the harm.

Lawrence H. Tribe, *American Constitutional Law* 887-890 (2d ed. 1988).

Florida Star itself—the case on which petitioners place their greatest reliance—articulated a nuanced approach to First Amendment scrutiny, *not* an approach of "truthful speech above all." The statute in *Florida Star* was both content-based and speaker-discriminatory. *See* Pet. Br. 24-25. The Court there applied, as a "limited principle[ ] that swe[pt] no more broadly than the appropriate context of th[at] case," the rule that, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). In justifying its decision to adopt that standard, previously articulated in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), the *Florida Star* Court explained that confining the *Daily Mail* standard to information "lawfully obtained" leaves the government "ample means of safeguarding significant interests upon which publication may impinge." *Id.* at 534. In particular, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition,

thereby bringing outside the *Daily Mail* principle the publication of any information so acquired." *Id.*

The Court observed as well that "the *Daily Mail* principle" would generally operate to protect the press only in disseminating "information which is already publicly available," *id.* at 535—as was the case in *Florida Star* itself.

Respondents are wrong to maintain that *Florida Star* should be read as mandating strict scrutiny of every restriction on disclosure of information except where the person making the disclosure violated some law in acquiring the information. *See* Vopper Br. 21-22; Yocum Br. 40-42. That is not a fair reading of this Court's opinion, which acknowledged the possibility of punishing "*the ensuing publication*" of information "acquired unlawfully by a newspaper *or by a source*," 491 U.S. at 535 n.8, and which indicated in broad terms that the government should be able to prohibit publication of "sensitive information [that] rests in private hands" without having to satisfy the *Daily Mail* test. *See* 491 U.S. at 534.

Cohen v. Cowles Media Co., 501 U.S. 663 (1991), also indicates that *Daily Mail* and *Florida Star* should not be read to make the level of First Amendment scrutiny depend on whether a defendant literally broke a law in obtaining information. The defendant newspaper in Cohen had broken no law when it obtained information after giving a promise of confidentiality, yet the Court stated that, because the newspaper ultimately "did not honor" its promise, it was "not at all clear" that the information had been obtained "lawfully" within the meaning of the *Daily Mail* standard, "at least for purposes of publishing it." 501 U.S. at 671.

That the government has not criminalized the receipt of particular information sometimes indicates that the government does not recognize a substantial interest in protecting the information from disclosure, or that the government is discriminating among speakers. *Florida Star*

was such a case; the information was disclosed by the government itself, and only "instrument[s] of mass communication" were prohibited from making further disclosure. Here, in contrast, the statutes prohibit every disclosure and use, by any person or entity, of unlawfully intercepted communications (provided, of course, that the defendant knew or had reason to know that the communication was unlawfully intercepted). By prohibiting all *disclosure*, the statutes prevent *receipt*; and by prohibiting every *use* of intercepted communications, the statutes effectively eliminate the *incentive* for receipt. Given all this, that the legislatures did not also make receipt, in and of itself, an offense is of no consequence. The suggestion that strict scrutiny should be required here merely because the legislatures did not take that additional and wholly unnecessary step—but that a lower level of scrutiny would apply if the legislatures *had* made "receipt" a separate offense, *see* Yocum Br. 40—has no principled basis.[9]

All things considered, the statutes as applied here "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify

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[9] That a government official may have violated a duty with regard to the handling of records in *Florida Star*, or that, in *Landmark Communications*, some participant in the judicial commission proceedings may have violated a nondisclosure obligation, *see* Vopper Br. 21, hardly establishes those cases as precedent for the proposition that it never matters whether information being published was originally obtained in violation of a law protecting confidentiality. *Florida Star* explicitly leaves that question open. And, to note only one sharp distinction between *Florida Star* and this case as regards the underlying breach of confidentiality, in *Florida Star* the Court reasoned that the effect of the failure of the Sheriff's Department to comply with the confidentiality statute was to "convey to [the media] that the government considered dissemination lawful, and indeed expected the [media] to disseminate the information further." 491 U.S. at 538-539. There is nothing comparable in this case.

application of the most exacting level of First Amendment scrutiny." *Turner Broadcasting*, 512 U.S. at 661.

II. THE STATUTES AS APPLIED SATISFY THE REQUISITE SCRUTINY

Respondents devote much of their argument to an attempted rebuttal of petitioners' contention that the statutory restrictions on disclosure are justified as a means of deterring interception. *See* Yocum Br. 11-23; Vopper Br. 38-40. Respondents' position on that subject is patently counterfactual,[10] and we adopt the Solicitor General's reply.

We focus instead on the other principal justification for the challenged provisions, as applied here—*viz*, that the broadcast of an intercepted communication, whether by the interceptor or by a recipient, "compounds the statutorily prescribed invasion of . . . privacy by adding to the injury of the interception the insult of . . . disclosure." *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972). *See* Pet. Br. 34-36.

A. The Statutes Further Important Purposes

Citing *Florida Star*, *Daily Mail*, and *Cox Broadcasting*, respondents declare that this Court has given short shrift to

[10] Respondents declare that it is "purely speculative" to contend that "those who unlawfully intercept communications are difficult to identify and prosecute." Vopper Br. 39. But that proved true in this very case. (Although petitioners Bartnicki and Kane made what they described as a "wild guess" that a particular School Board member might have been involved in the interception, they had no evidence to establish this. *See* Kane Dep., Dec. 30, 1994, at 64-68; Bartinicki Dep., Dec. 30, 1994, at 38-40. The Board member denied having anything to do with the interception, Warman Dep. 17, 21-22, and respondents do not suggest that a fuller investigation would have succeeded in revealing the Board member as the culprit.) Similarly, respondent Yocum purports to doubt that a person who intercepts a communication could succeed in passing it anonymously to a third party, *see* Yocum Br. 17; but, if Yocum's own testimony about his acquisition of the tape is to be believed, that too is what happened in this very case.

interests in protecting privacy and confiden--tiality. *See* Vopper Br. 30-32. Respondents have misread the decisions.

In *Daily Mail* "there [wa]s no issue . . . of privacy." 443 U.S. at 105. Rather, the asserted state interest was one of "further[ing] [the] rehabilitation" of juvenile offenders. *Id.* at 104. In any event, the holding in *Daily Mail* was that, "even assuming the statute served a state interest of the highest order, it d[id] not accomplish its stated purpose," *id.* at 105, because it restricted only newspapers.

In *Florida Star*, the Court found nothing lacking in the "highly significant interests," 491 U.S. at 537, asserted by the government in support of protecting the anonymity of rape victims. On the contrary, the Court indicated that in proper circumstances, the interests at stake might well justify "punish[ing] publication of the name of a victim of a sexual offense." *Id.* at 541. The Court simply determined that the government had not established the "need" for a selective ban on media disclosure where "the government itself [had] provide[d] [the] information to the media." *Id.* at 537-538.

In *Cox Broadcasting*, the Court, after noting the "impressive credentials for a right of privacy," 420 U.S. at 489, pointed out that the case before it was not grounded in "a physical or other tangible intrusion into a private area," *id.* Moreover, like *Florida Star*, the decision turned on the determination that, "[b]y placing the information in the public domain on official court records," the State "must be presumed to have concluded" that confidentiality was not vital. *Id.* at 495. The Court added that if a government wishes to prevent publication of certain information, it should take steps to "avoid public documentation or other exposure of private information." *Id.* at 496.

Congress and the Pennsylvania legislature had powerful legitimate reasons for protecting individuals from having their private conversations intercepted through electronic

surveillance. *See* Pet. Br. 30.[11] And it is perfectly clear that disclosure of an unlawfully intercepted communication "compounds" the injury the legislatures properly acted to prevent. *Gelbard*, 408 U.S. at 51-52. *See* Pet. Br. 35.[12] As one of respondents' *amici* puts it, "[s]ociety cares about preventing the initial interception of confidential communications in significant measure because we do not want the content of those communications to be made public." Brief *Amicus Curiae* of the American Civil Liberties Union at 20.

Consequently, the first prong of the intermediate scrutiny test—whether the law, as applied, "furthers an important or substantial governmental interest," *Turner Broadcasting System*, 512 U.S. at 662 (1994)—is satisfied here.

[11] The suggestion that Congress was concerned only with industrial and domestic relations espionage, *see* Vopper Br. 3, 5, 37, is incorrect. *See, e.g.*, S. Rep. No. 90-1097, 90th Cong., 2d Sess. 67 (1968) (discussing need to prevent interception and subsequent use of communications relating to "personal, marital, religious, political, or commercial concerns").

[12] Respondents note that at common law, it generally is not considered tortious for a third party to disclose information obtained by another's intrusion. *See* Vopper Br. 24 n.15. The common law *does*, however, recognize that disclosure compounds the injury of an intrusion. *See* Restatement (Second) § 652D, Cmt. A ("disclosure of the information . . . obtained [through intrusion] will certainly add to the amount of damages"); *Schulman*, *supra* note 8, 955 P.2d at 496 n.18; *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971). Because the intrusion tort reaches every kind of intrusion that "would be highly offensive to a reasonable person," Restatement § 652B, it is unsurprising that the common law does not make the media liable for disclosing information obtained by a source through any means that might be deemed "intrusive." This does *not* undercut the considered judgment of Congress and state legislatures, in the narrow and specific context of wiretapping statutes, that the media should not be free to broadcast what it knows, or has reason to know, is an illegally intercepted communication.

B. The Governmental Interests Are Unrelated to the Suppression of Free Expression

The second prong of the intermediate scrutiny test—that "the governmental interest is unrelated to the suppression of free expression," *id.*, also is satisfied.

Respondents argue that the mere fact that the statutes' purpose is, in part, to prevent harm caused by speech amounts to "the suppression of free expression." *See* Vopper Br. 34-36. Such a simplistic notion would wipe from the books, *inter alia*, all protective orders, copyright laws, and laws prohibiting fraud, defamation and blackmail. That is not what intermediate scrutiny dictates. In this context, "suppression of free expression" refers to efforts to restrict *disfavored messages*. *See United States v. O'Brien*, 391 U.S. 367, 382 (1968) ("a statutory phrase which punished people who expressed their 'opposition to organized government'" would be "aimed at suppressing communication").

As Congress recognized, protecting private conversations from being intercepted and disclosed *promotes* free expression. *See* Pet. Br. 30-34. Petitioners argue that an interest in enabling persons to speak freely cannot justify prohibiting others from speaking. That point may hold where statutory distinctions are content-based—as, for example, in the hypothetical example of a law that prohibits critical reviews in order to encourage authors. *See* Brief of *Amicus Curiae* Liberty Project at 19-20. But *Harper & Row* shows that petitioners' point does *not* hold where speech is "suppressed" only because it has been *stolen*. Otherwise, it would be unconstitutional to prohibit disclosure of an intercepted communication even by the interceptor himself.[13]

[13] Nor can *Harper & Row* be distinguished on the ground that what was at issue there was only the publication of verbatim expression rather than of underlying facts. *See* Yocum Br. 30 n.20, 28-29; Vopper Br. 49 n. 31. That same situation is presented in this case. Although other applications

C. The Statutes Are Adequately Tailored

The final requirement of intermediate scrutiny is one of tailoring, which is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broadcasting*, 512 U.S. at 662.

1. Respondents avoid discussing how that test plays out as applied to the conduct at issue in this case—distributing and broadcasting the tape of a private telephone conversation—preferring instead to focus on *other* cases that might arise under the statutes, involving scenarios ranging from calls not made in private, *see* Yocum Br. 25, to broadcasts made after a communication has "already been emblazoned on the front page of every newspaper in the country," *id.* at 26, to broadcasts of a call about "something as mundane as a grocery list," *id.*, to circumstances where "the parties to the communication approve or even *encourage* the disclosure," *id.* at 30 (emphasis in original), to situations where the media mention facts derived from an intercepted communication without broadcasting the communication itself, *id.* *See also* Vopper Br. 13, 45-46.

a. To the extent that the statutes would apply to those hypotheticals, such applications would be constitutional. Private persons have a legitimate interest in not having even their "grocery lists" broadcast over the radio for the delectation of the general public; and for the legislatures to

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of the statute—*not* properly at issue here, *see infra* at 17-19—might involve the disclosure of facts derived from an intercepted communication rather than a broadcast of the communication itself, "the party may disseminate the identical information . . . as long as the information is gained through [other] means." *Seattle Times*, 467 U.S. at 34. Furthermore, in *Harper & Row* itself, the *fact* of precisely how President Ford had characterized the historical events described in his memoirs was what The Nation thought it vital to publish, and this was held properly prohibited. *See Harper & Row*, 471 U.S. at 556.

have made the application of the statutes depend on case-by-case assessments of the degree to which a communication contains information of a particularly confidential nature would have been to undo the statutes' content-neutrality.

b. But, it is far from clear whether the scenarios conjured up by respondents would even violate the statutes. For example, to "disclose" is to reveal something *unknown*. *See Black's Law Dictionary* 551 (4th ed. 1968) (definitions of "disclose" and "disclosure"). That no doubt explains why Congress understood that Title III would *not* reach the publication of material that already is common knowledge. *See* Pet. Br. 18.

There is no occasion in this case to sort out which of the various scenarios posited by respondents would violate the statute, or to proceed to determine the constitutionality of the hypothesized applications. Respondents challenged the statutes *only as applied to them*, *see* Answers (JA 19-23, 31-37), and the questions certified for appeal were limited accordingly. *See* Pet. App. 76a. In their briefs to the Court of Appeals, respondents took pains to emphasize that *only* their conduct in "providing" (Yocum) and "broadcasting" (Vopper) the "newsworthy tape" was at issue. Neither in those briefs nor in the Third Circuit's decision is there the slightest mention of the statutes' potential application to other situations such as respondents now wish to debate. On the contrary, the Third Circuit emphasized that the question before it was confined to "the unique facts and circumstances of this case." Pet. App. 14a.

"The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). That rule, to be sure, allows an exception for "facial overbreadth

adjudication." *Id.* at 615. But "[a]pplication of the overbreadth doctrine in this manner is, manifestly, strong medicine . . . employed by the Court sparingly and only as a last resort." *Id.* at 613. In particular, overbreadth analysis comes into play only where a party has "assert[ed] a facial challenge" to a statute. *Renne v. Geary*, 501 U.S. 312, 323 (1991). *See also id.* at 328 (White, J., dissenting) ("The courts below erred in treating respondents' challenge . . . as a facial challenge . . . [because] they challenged only *the application* of [the statute]") (emphasis in original).[14]

This is a particularly proper context in which to apply the rule that a party asserting an "as applied" challenge cannot raise other possible applications of a statute. "The sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star*, 491 U.S. at 533.

An overbreadth challenge would fail anyway. "This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *Parker v.*

[14] *Cf. Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 623 (1996) (Court would decide only the narrow issue presented by the petitioner's "'as applied' challenge"); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 883 (1997) (noting distinction between a facial challenge and "an 'as-applied' challenge").

Contrary to respondents' apparent assumption, *see* Vopper Br. 45; Yocum Br. 25, the inquiry into whether a challenged law "burden[s] substantially more speech than is necessary to further the government's legitimate interests," *Turner Broadcasting*, 512 U.S. at 662, does not convert every "as applied" challenge into an overbreadth challenge. *Turner Broadcasting* was a facial challenge. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 793-795 (1989) ("a facial challenge"); *Hill*, 120 S. Ct. at 2485 (complaint alleged that the statute was "facially invalid").

Levy, 417 U.S. 733, 760 (1974). The conduct at issue in this case—distributing and broadcasting a tape of an unlawfully intercepted conversation—falls within "a whole range of easily identifiable and constitutionally proscribable . . . conduct," *id.* (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 581 (1973)), which the statutes properly prohibit.

2. There is no force to respondents' suggestions that, instead of prohibiting disclosure of intercepted communications, the legislatures should have sought to reduce the frequency of interception by imposing stiffer penalties or by encouraging technology that makes interception more difficult. *See* Vopper Br. 44-45. To pass constitutional master, the statutes "need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broadcasting*, 512 U.S. at 662. The steps proposed by respondents would not eliminate interceptions.[15] In any event, there is a legitimate interest in protecting the security and privacy of telephone conversations conducted even by the tens of millions of people who have not replaced their analog telephones with digital models, *see* Yocum Br. 14 n. 7—to say nothing of the *other parties* to such conversations, who have no way of knowing what kind of phone is on the other end of a call. *See* Pet. Br. 29.

3. Finally, these statutes—very much *unlike* the statute in *Florida Star*, *see* 491 U.S. at 539—contain a meaningful scienter requirement. *See Hill*, 120 S. Ct. at 2495 (scienter requirement indicates statute is narrowly tailored). The "reason to know" requirement, given its ordinary meaning, *see* Pet. Br. 44, is more demanding than mere "fault," which is all that is required in *content-based* defamation actions brought by private individuals, even with respect to speech on matters of public concern. *Gertz*, 418 U.S. at 347. Indeed,

[15] "[D]igital cellular . . . [is] not immune from eavesdropping." H. Rep. No. 106-725, 106th Cong., 2d Sess. 10 (2000). Moreover, digital service is not available in much of the country.

the "reason to know" standard is not appreciably less protective of the media than the "reckless disregard" requirement that applies to defamation actions brought by "public officials" and "public figures"—a requirement we do not believe is warranted here, but which the courts could apply if and where called for under these statutes.[16]

For all of these reasons, the statutes as applied here satisfy intermediate scrutiny. Indeed, they would satisfy even strict scrutiny.

CONCLUSION

The decision of the Court of Appeals should be reversed.

[16] In defamation actions, "public officials" and "public figures" are required to prove actual malice because, by virtue of their public roles, they both assume the risk of attacks on their reputation and have access to the media to respond to such attacks. *Gertz*, 418 U.S. at 344-345. Public figures do *not* assume the risk of electronic surveillance; and to suggest that they should simply avail themselves of the media to respond to disclosures of their intercepted private communications would "betray[ ] a misunderstanding of the character of the harm" worked by such disclosure. Tribe, *supra* at 890. In any event, whether petitioners are "public figures" has not been determined. *See, e.g, Lyons v. New Mass Media, Inc.*, 453 N.E. 2d 451 (Mass. 1983) (whether union president was public figure turned on facts not fully developed). If it were determined that these statutes constitutionally could be applied only upon proof that a defendant acted with reckless disregard of whether a communication was unlawfully intercepted, the courts could construe the statutes as incorporating such a limitation, notwithstanding that it does not appear on the face of the statutes. *See Linn v. Plant Guard Workers*, 383 U.S. 53, 64 (1966) (construing National Labor Relations Act to incorporate actual malice standard); *Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974) (same re federal labor-management executive order).

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In the Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
PETITIONERS

v.

FREDERICK W. VOPPER, AKA FRED WILLIAMS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. Title III Is Subject To Intermediate Scrutiny

Respondents take issue with our submission (U.S. Br. 11-12, 20-28) that Title III's prohibition on the use and disclosure of illegally intercepted communications is subject to intermediate scrutiny. As we have explained, three reasons support our conclusion. First, the prohibition is content neutral, because it bars exploitation of *all* communications known to have been intercepted in violation of Title III, without regard to the communication's content, while permitting the identical content to be used or disseminated freely if it is not obtained from an unlawful interception. U.S. Br. 20-23. Second, Title III treats speech and non-speech uses of illegally intercepted communications identically; it thus does not single out speech for disfavored treatment. U.S. Br. 23-27. Third, Title III not only protects a legally recognized zone of privacy against technological intrusion, but also furthers First Amendment values by encouraging uninhibited interchange and discussion among private parties—interchange that would be chilled if every communication were subject to the threat of unrestricted use and dissemination following illegal interception. U.S. Br. 27-28. This Court and its members have recognized that those characteristics make intermediate scrutiny appropriate. See *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny"); *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because" of "incidental effects on [the press's] ability to gather and report the news"); *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring) (intermediate scrutiny proper where "constitutionally protected interests lie on both sides of the legal equation").

1. Respondents resist intermediate scrutiny by contending that Title III is content based, because assertedly it is

"hostile toward" messages that contain "supposedly private information," Yocum Br. 48, or has the "sole goal" of "suppress[ing] speech," *id.* at 46-47. See also WFAA-TV Br. 19-20. Those assertions overlook the fact that Title III bars use and disclosure of stolen communications whether or not they concern matters that might be labeled intimate or private. Title III's concern is not the content of the stolen speech, but the fact that it was unlawfully obtained by the use of electronic or mechanical eavesdropping devices. Respondents also overlook that Title III does not prohibit publication of the same information if it is not obtained through illegal interception, even if that information is highly private. Finally, respondents' claim that Title III has a speech-suppression purpose overlooks the fact that the prohibition extends to all exploitation of illegally intercepted communications, whether or not the prohibited uses are expressive. See U.S. Br. 24.[1]

Title III thus does not (Liberty Proj. Br. 6, 8, 13) seek to prevent "the disclosure of certain information to the public," or "reflect the government's preference for silence." Title III aims at the unlawful theft of communications in the first instance, and the exploitation of such stolen communications thereafter. And it does so not to regulate topic, viewpoint, or content, but rather because permitting the untrammeled exploitation of stolen communications increases the incentive to engage in unlawful interception in the first instance, and because the exploitation of stolen communications multiplies

[1] The prohibition on non-expressive uses cannot be dismissed as a "minor aspect" (Liberty Proj. Br. 8) of Title III. The vast majority of use-and-disclosure cases involve non-expressive uses (*e.g.*, use by one spouse against the other to obtain an advantage in divorce) or disclosures made to permit such uses (*e.g.*, to the divorce lawyer). See Vopper Br. 38 n.24. In an appendix to this brief, we reproduce the list of private use-and-disclosure cases that were cited in the appendix to the Vopper Brief (at 9a-13a), together with parentheticals describing the relevant facts.

the intrusion on the right of conversational privacy that Title III protects. U.S. Br. 34-35.

2. Respondents and their amici argue that Title III is content based on its face because, "[t]o determine whether Title III applies," the communication's "'contents' must be assessed." Vopper Br. 25 n.16; Yocum Br. 48. This Court rejected precisely that argument last Term, declaring that it has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies." *Hill* v. *Colorado*, 120 S. Ct. 2480, 2492 (2000). Content neutrality depends on whether the statute discriminates based on topic or viewpoint, *id.* at 2491, or was adopted "because of [agreement or] disagreement with the message," *Turner*, 512 U.S. at 642 (quotation marks omitted)—not on whether a court must examine the contents of the statement as part of the statute's enforcement.

The need to examine "content" under Title III requires only a comparison between the disclosure at issue and the underlying intercepted communication. That comparison does not involve a judgment that favors or disfavors disclosures on particular topics or viewpoints. Were it otherwise, copyright actions would be subject to strict scrutiny merely because a court must examine the expression to see if it appropriates copyrighted material; likewise, breach of contract actions would be subject to strict scrutiny because one must review the agreement to identify the promise that was made. See also *Hill*, 120 S. Ct. at 2492 (other examples). Indeed, if respondents were correct, the judicial order in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984)—which barred the newspaper from disclosing information obtained through discovery and thus required review of the newspaper's disclosures as part of enforcement—would have been subject to strict scrutiny; this Court upheld that order under an intermediate level of scrutiny. *Id.* at 32. Nor do the cases that respondents and amici cite support the contrary view.

Those cases instead show that strict scrutiny generally applies to statutes that discriminate on subject, viewpoint, or speaker, or that otherwise single out speech for unique sanction.[2]

3. Finally, respondents and their amici argue (Yocum Br. 46-47; WFAA-TV Br. 11-13) that Title III is not a law of general applicability, since it specifically identifies speech (disclosure) as falling within its prohibition. As Title III's plain terms indicate, however, it applies with equal force to all forms of exploitation, whether non-expressive ("use"), or expressive ("disclosure"). See U.S. Br. 25. The fact that First Amendment activity, such as publication or broadcast, may be involved in a particular case results in no different or additional sanction. Respondents and their amici are correct that Title III bars use and disclosure in separate subsections —use in 18 U.S.C. 2511(1)(d), and disclosure in 18 U.S.C. 2511(1)(c)—and that "disclosure" thus is not a subset of "use." Vopper Br. 28; Yocum Br. 45; WFAA-TV Br. 13-14.

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[2] See, *e.g.*, *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (Son-of-Sam law subjected to strict scrutiny because it "singles out income derived from expressive activity for a burden the State places on no other income," and was "directed only at works with a specified content," *i.e.*, writings about the felon's crimes); *Burson* v. *Freeman*, 504 U.S. 191 (1992) (statute barring vote solicitation near polling stations but placing no burden on any other speech or solicitation); *FCC* v. *League of Women Voters*, 468 U.S. 364, 384 (1984) (statute banning "editorializing" on "matters of public concern" that discriminated among speakers—"singl[ing] out noncommercial broadcasters and den[ying] them the right to address their chosen audience" on those matters—reviewed carefully because it might "reflect[] an impermissible attempt to * * * control . . . the search for political truth") (quotation marks omitted); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228, 230 (1987) (statute that taxes magazine based on the subjects of the articles requires strict scrutiny because "selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State"); *Leathers* v. *Medlock*, 499 U.S. 439, 453 (1991) ("differential taxation * * * does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas").

But the statute's scope and operation would be identical if Congress had barred all uses, "including" disclosure, in a single provision. See U.S. Br. 24-25. Congress's decision to bar non-expressive uses in one section and disclosures in another has no constitutional significance.

B. The *Florida Star* Line Of Cases Is Inapposite

Respondents also contend that Title III is subject to strict scrutiny even if it is generally applicable and content neutral. Respondents mainly rely (*e.g.*, Vopper Br. 20-21) on a line of cases culminating in *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), that apply the "*Daily Mail*" principle, *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97 (1979)—that strict scrutiny applies to laws punishing the publication of truthful information, on matters of public significance, that was "lawfully obtained." *Florida Star*, 491 U.S. at 533, 541. Because the *Daily Mail* principle applies only when the information was "lawfully obtained," it has no application to cases such as this one in which the communication was not. As this Court explained in *Florida Star*, "[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8. To the contrary, when "sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.* at 534.[3]

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[3] Respondent Yocum argues (Br. 39-40) that the *Daily Mail* principle applies here because Congress did not also punish the *receipt* of the communication later disclosed. That argument overlooks the substance of Title III. Congress barred both the initial acquisition *and* any later disclosures of protected communications. Prohibiting the intermediate step of passive receipt would not add protection, given the difficulty of deterring the passive acquisition of information and the potential unfairness of so doing. In any event, it would make no sense that the level of scrutiny

Respondents contend (Vopper Br. 20, 22; Yocum Br. 41-42) that *Flordia Star* reserves only whether government may punish the unlawful interceptor's *own* disclosure. That contention cannot be reconciled with *Florida Star*'s language, which speaks of "punish[ing] * * * the ensuing publication" where the information "has been acquired unlawfully by a newspaper *or a source*," 491 U.S. at 535 n.8 (emphasis added and omitted); ordinarily, the newspaper that engages in the "ensuing publication" is understood to be a different entity than the "source" that acquired the information unlawfully in the first instance.

Respondents' argument also rests primarily on the incorrect assertion (Vopper Br. 21; Yocum Br. 39-40) that *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), and *Florida Star* necessarily resolved the issue, because the information in those cases was "disclosed" or "divulged" by the police or others "in violation of a statutory duty." Vopper Br. 21; Yocum Br. 39-40; McDermott Br. 7-8. But the speakers in those cases did not *obtain* the information unlawfully; nor did their sources. To the contrary, in those cases, a lawful custodian of information released it into the public domain. In that context, those seeking to protect their information can more carefully select and supervise those to whom they entrust it. See *Florida Star*, 491 U.S. at 534; U.S. Br. 31-32. Where communications instead are illegally seized by strangers through an unlawful intrusion into a protected zone of privacy, that means of protection is unavailable, because there is no entrustment. There is instead only an unlawful invasion, potentially by means (*e.g.*, a hidden bug) against which individuals cannot reasonably protect themselves. It is for that reason that this Court has reserved from the scope of the *Daily Mail* principle cases in which the information is "acquired unlawfully," see *Florida*

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would be lower if only Congress had prohibited not just willful interception and willful disclosures, but passive receipt as well.

Star, 491 U.S. at 535 n.8, rather than cases in which the information is disclosed unlawfully. Indeed, for similar reasons, this Court in *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469, 489 (1975), was careful to note that the information in that case (a rape victim's name) was acquired from court records, rather than from "a physical or other tangible intrusion into a private area." See also *Florida Star*, 491 U.S. at 533. The communication in this case, in contrast, was obtained through an intrusion into a legally recognized zone of privacy. See also p. 16, *infra*.

Moreover, the statutes at issue in the *Florida Star* line were not truly content neutral. For example, while Vopper relies (Br. 25-26) on *Butterworth* v. *Smith*, 494 U.S. 624 (1990), and *Landmark*, *supra*, the statutes in those cases sought to suppress information on particular topics (grand jury investigations in *Butterworth* and judicial misconduct proceedings in *Landmark*), with the manifest objective of preventing public dissemination of the substance of particular governmental proceedings. The remaining cases in the *Florida Star* line similarly addressed statutes that identified topics (*e.g.*, crime victim's name, identity of juvenile offender) on which reporting was prohibited. U.S. Br. 30-31. Nor were the statutes at issue in the *Florida Star* line laws of general applicability, since they applied solely to speech itself. U.S. Br. 30. See, *e.g.*, *Butterworth*, 494 U.S. at 627 & n.1 (making it unlawful to "disclose," "publish," or "communicate," but not barring other uses); *Landmark*, 435 U.S. at 831 n.1 ("divulge"). Title III, in contrast, is comprehensive, prohibiting *all* exploitation of illegally intercepted communications. In the First Amendment context, "comprehensiveness * * * is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 120 S. Ct. at 2497. See also U.S. Br. 25-26.

Respondents and their amici also cite a variety of other cases in an effort to prove that content-neutral laws of general applicability can be subject to strict scrutiny. See

Vopper Br. 27; WFAA-TV Br. 11-12; Liberty Proj. Br. 9-10. That effort fails. Many of the cases they cite involve statutes that were not content neutral or generally applicable.[4] Others do not address the level of scrutiny.[5] And still others involve laws that suppress "too much speech" by "foreclos[ing] an entire medium of expression" that is "uniquely valuable or important," *City of Ladue* v. *Gilleo*, 512 U.S. 43, 54, 55 (1994). Respondents, however, nowhere argue that Title III forecloses an entire (much less a "uniquely valuable") medium of expression, and do not claim that they often knowingly rely on illegally intercepted communications. See p. 20, *infra*. Finally, reliance on this Court's defa-

[4] *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (cited Vopper Br. 27) is one such case. *Buckley*, this Court has explained, "stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658. The Court in *Buckley* also noted that the limitations at issue there could not satisfy the *O'Brien* test because "the interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." 424 U.S. at 17. Thus, "[a]lthough the Act does not focus on the ideas expressed," it was, in the Court's view, "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression." *Ibid.* No such governmental objective of readjusting political debate is present here. Moreover, the statute in *Buckley*, although "neutral as to the ideas expressed," was not neutral as to subject; it singled out for special limit the "political expression" that lies "at the core of our electoral process and of the First Amendment freedoms." *Buckley*, 424 U.S. at 39 (quotation marks omitted). Nor does *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), support respondents' view. There, the Court held that the intentional infliction of emotional distress tort could not be invoked to punish speech because it provided no "principled standard" as to what speech was impermissible, *id.* at 55, and because the "outrageousness" standard was effectively content based because its "inherent subjectiveness" invited juries to impose liability based on the "adverse emotional impact" of the content, *ibid.* See pp. 16-17, *infra*.

[5] *E.g.*, Liberty Proj. Br. 9-10 (citing *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); and *Cox* v. *Louisiana*, 379 U.S. 536 (1965)). *Cox*, moreover, may have involved a content-based statute. See 379 U.S. at 551.

mation decisions is misplaced. Those cases do not purport to apply strict scrutiny, and in any event, defamation law, which addresses only statements about a person that injure reputation, is inherently content based and, far from being generally applicable, is wholly speech specific. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Title III, in contrast, is generally applicable and does not proscribe any particular sentiment or subject; it instead proscribes reliance on a particular unlawful source.

Respondents and their amici at bottom argue that their use of stolen communications should receive the same level of constitutional protection and scrutiny as would dissemination of their own original thoughts and viewpoints. That position cannot be reconciled with the Nation's copyright laws, which protect original authors while imposing liability for the publication of a misappropriated manuscript. See, *e.g.*, *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985). Nor can it be squared with the common law (see U.S. Br. 35 & n.10), which held the publication of a private letter without the author's consent—the functional equivalent of respondents' broadcast of a verbatim recording of Bartnicki and Kane's conversation—to be an actionable wrong from before this Nation was founded.[6] Stolen books and letters may be truthful in content, but the government may punish their dissemination, reproduction, or use, so long

[6] *Birnbaum* v. *United States*, 436 F. Supp. 967, 979-980 (E.D.N.Y. 1977). See, *e.g.*, *Pope* v. *Curl*, 26 Eng. Rep. 608 (K.B. 1741) (enjoining publication of book of letters); *Thompson* v. *Stanhope*, 27 Eng. Rep. 476 (K.B. 1774) (familial letters); *Gee* v. *Pritchard*, 36 Eng. Rep. 670, 678 (K.B. 1818) (personal letters); *Folsom* v. *Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (George Washington's letters); *Woolsey* v. *Judd*, 11 Super. Ct. (4 Duer) 379, 11 How. Pr. 49 (N.Y. Super. 1855). Accord G. Curtis, *A Treatise on the Law of Copyright* 94 (1847) (letter's author has right to "decide whether there shall be any publication at all"); E. Drone, *The Law of Property in Intellectual Productions* 130-131 (1879) ("right to withhold * * * expressed thoughts from publication is as inviolable as [the] right to publish them").

as it does not discriminate regarding topic or viewpoint. Title III does precisely that with respect to stolen conversations, like the one at issue here.[7]

C. Title III Satisfies Intermediate Scrutiny

Title III's bar on use and disclosure furthers three substantial governmental interests: it lessens the incentive to engage in illegal interceptions; it prevents the compounding of damage that occurs when such interceptions are used or disseminated; and it promotes frank and candid exchange (and the use of new communications technologies) by assuring those who speak in private that their words will not be intercepted and broadcast for all the world to hear.

1. Respondents do not dispute the well-established principle that eliminating the outlets for, and potential benefits of, criminal activity decreases the incentive to engage in

[7] Respondents' assertion (Yocum Br. 28-29; Vopper Br. 30 n.20, 49 n.31) that Title III bars the disclosure of *facts*, whereas statutory and common law copyright relate only to the form of *expression*, hardly assists their cause, since respondents appropriated expression by broadcasting an entire verbatim recording of the intercepted conversation. There is no reason for this Court to reach out beyond this case to decide Title III's applicability in the infrequent case that does not involve a tape recording (*i.e.*, a literal reproduction of expression). The Court repeatedly has eschewed broad pronouncements in this area, instead "relying on limited principles that sweep no more broadly than the appropriate context of the" case before it. *Florida Star*, 491 U.S. at 533. In this case, that principle is that government may constitutionally punish the publication of expression appropriated through illegal intrusions into a constitutionally recognized zone of privacy. Indeed, because respondents disseminated expression, they lack standing to challenge Title III on the ground that its prohibition may also extend to facts. See Bartnicki Reply Br. 15 n.13, 17-19. Nor can respondents rely on the doctrine of substantial overbreadth to challenge the statute "on its face because it also threatens others not before the court," *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). This suit involves only an *as applied* challenge; and the question certified by the district court asks only if liability can be imposed "for broadcasting the newsworthy *tape*," Pet. App. 76a (emphasis added). In any event, even as to facts, Title III is constitutional for the reasons given in this brief and in our principal brief.

criminal acts. See U.S. Br. 37-38, 40-42 (citing 2 W. R. LaFave & A. W. Scott, Jr., *Substantive Criminal Law* § 8.10(a), at 422 (1986); *New York* v. *Ferber*, 458 U.S. 747, 759-760 (1982); and *Osborne* v. *Ohio*, 495 U.S. 103, 109-110 (1990)). Respondents instead argue that the principle is inapplicable here because Congress did not rely on it in Title III's legislative history, Vopper Br. 37-38; and they dispute whether, in this context, eliminating the outlets for the fruits of illegal conduct will actually deter illegal interceptions, Vopper Br. 39; Yocum Br. 16-23.[8] As to the first argument, this Court does not require the legislative history to mention every rationale for purposes of intermediate scrutiny. See *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 70-71 & n.19 (1983); *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993). That should be especially true where, as here, the rationale is sufficiently obvious. No one disputes that Title III's exclusionary rule, 18 U.S.C. 2515, which proscribes the use of illegally intercepted communications as evidence, is designed to lessen the incentive to engage in illegal interceptions in the first instance. See Yocum Br. 22. It stands to reason that Section 2511(1), which proscribes all other means of exploiting such communications, serves the same purpose in the same way, *i.e.*, it decreases the incentive to engage in unlawful invasions by making the fruits of the violation not

[8] Respondents distinguish the prohibitions in *Ferber* and *Osborne*, as well as the proscription on the receipt of stolen property, by noting that those prohibitions either do not bar speech at all or bar speech of "exceedingly modest" First Amendment value. Yocum Br. 21-22; Vopper Br. 39. Respondents misunderstand our position. We do not contend that *Ferber* and *Osborne* control this case; we contend only that they recognize that foreclosing outlets for the proceeds of criminal activity deters the underlying illegal conduct. Respondents also err by asserting (*e.g.*, Yocum Br. 12) that the government has not "adduce[d] any evidence" to support the deterrence rationale. Quite apart from the fact that the government has never been given the opportunity to present evidence, U.S. Br. 42 n.14, no evidence is required, since the connection between outlets for the fruits of illegal conduct and the incentive to engage in that conduct is obvious and borne out by this Court's cases.

merely unusable in court, but for any other purpose as well. See *Boehner* v. *McDermott*, 191 F.3d 463, 469-470 (D.C. Cir. 1999); *Fultz* v. *Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991).

Respondents also claim that, because the incentive to engage in unlawful interceptions is not always financial, Vopper Br. 39, or driven by a "market" for the illegal fruits, Yocum Br. 12-13, eliminating outlets for intercepted communications will not deter interceptions.[9] Respondents err. Whether or not one uses market terminology, the incentives for illegal interceptions—which can range from a desire to embarrass a disliked neighbor to the achievement of political ends—are undoubtedly increased if intercepted communications can be freely used and disclosed by others. In fact, the cases show that wiretappers often derive a benefit from third-party disclosure, whether that benefit is the elimination of a competitor or simple revenge.[10] Indeed, in this very case, the illegal interception may have been motivated by a desire to embarrass the union and thereby defeat its bargaining demands, and the interceptor's *own* unlawful disclosure of the tape—leading to its eventual publication—seems clearly motivated by that goal. Nor is respondent

[9] Respondent Yocum incorrectly argues (Br. 13) that Title III's bar on "procur[ing] any other person" to intercept communications precludes a "market" or payment for illegally intercepted communications. To "procure" an illegal interception, however, one must "cause" or "induce" the interception before it occurs; payment after the fact by itself is insufficient. See *Black's Law Dictionary* 1087 (5th ed. 1979).

[10] See, *e.g.*, *Mayes* v. *LIN Television of Tex., Inc.*, No. 3:96-CV-0396-X, 1998 WL 665088 (N.D. Tex. Sept. 22, 1998) (illegal wiretap anonymously provided to plaintiff's political opponents, potentially by plaintiff's ex-wife); *Asmar* v. *Detroit News*, 836 F.2d 1347 (6th Cir. 1988) (Table) (anonymous tape recording revealing bribery by competing contractor sent to media); *Natoli* v. *Sullivan*, 606 N.Y.S.2d 504, 505 (Sup. Ct. 1993) (illegally taped call given to press to achieve "political, economic, personal and other advantage"); *Peavy* v. *WFAA-TV*, 221 F.3d 158 (5th Cir. 2000) (interception by feuding neighbor provided to media), petition for cert. pending, No. 00-69; *Forsyth* v. *Barr*, 19 F.3d 1527 (5th Cir.) (wiretap by neighbors with a "grudge" sent to police), cert. denied, 513 U.S. 871 (1994).

Yocum correct to assert (Br. 16) that interceptions cannot be deterred by barring use and disclosure because interceptions are not "targeted" at particular victims, or are generally motivated by voyeurism and not the possibility of later use. Review of the cases cited in the Vopper Brief Appendix (9a-13a), see App., *infra*, 1a-11a, demonstrates that most invasions are targeted and motivated by the possibility of later use.

Respondents also err when they assert (Vopper Br. 42; Yocum Br. 36) that Congress could achieve its goals by prosecuting wiretappers more vigorously. Congress specifically found that wiretapping is often a clandestine and difficult-to-detect enterprise, U.S. Br. 37-38 & n.12—a conclusion that remains true given the breathtaking technologies through which conversational privacy may now be breached—whereas follow-on uses are easier to detect and redress. Compare *Ferber*, 458 U.S. at 760 (government may deter the "low-profile, clandestine industry" that produces child pornography by attacking the more "visible apparatus of distribution").[11] Respondents' view would permit illegally intercepted communications to be "laundered" and disseminated on a large scale, as happened here. Without individuals (and institutions) willing to participate in that dissemination, wiretappers could rarely achieve such anonymous mass dissemination themselves. See *Boehner*, 191 F.3d at 471.

[11] Respondent Vopper suggests (Br. 42 n.27) that it is no more difficult to detect and prosecute unauthorized interceptors—who may use remote electronic means of surveillance—than those who physically invade the home or other locations. That assertion is directly contradicted by the President's 1967 Commission on Law Enforcement and Congress's express findings. See U.S. Br. 37 & n.12. Respondent Vopper's sole authority for his contrary claim, moreover, is a newspaper article discussing the investigation of computer viruses. Those who have considered the issue of unlawful interceptions consider them unusually difficult to detect. See C. Kaplan, *Spies Like Us*, Newsday, June 10, 1990, at 80 ("evidence to prompt an investigation can be hard to get," because "there's almost no way the government can know that [it] is happening").

While Yocum speculates otherwise (Br. 18), he never explains how the unidentified wiretapper who intercepted the conversation here could have disseminated it by himself to tens of thousands of radio listeners in the local community, particularly without increasing the likelihood of apprehension. Nor does it matter that relatively unsophisticated wiretappers—primarily individuals who record a spouse's conversation and try to use it in a divorce proceeding—often make no effort to disguise their conduct. See Vopper Br. 39-40 & n.25. Congress may address the actions of sophisticated actors as well.

Finally, noting Congress's desire to make wire and electronic communications as secure as the mails (U.S. Br. 4), respondents argue that Title III's prohibition on use and disclosure is unnecessary. Yocum argues that, because this Nation's mail theft statutes "contain no analogous prohibition" on disclosure, he "lawfully could have disclosed" a "copy of a letter stolen from the mails." Yocum Br. 20; see Vopper Br. 41-42. That assertion is simply incorrect. Common law copyright long has barred the dissemination of stolen letters. See p. 9 & note 6, *supra*. Respondents thus would have been no less subject to suit for reproducing the entirety of a stolen letter between Bartnicki and Kane than they are for reproducing the entirety of the stolen telephone conversation under Title III. Nor does Title III's use and disclosure prohibition stand "basically alone" (Yocum Br. 15) in American law. The prohibition not only has a venerable antecedent in the common law treatment of private letters, but it also stands alongside more than three dozen state statutes with similar prohibitions, U.S. Br. 37, and the statutes of nations sharing our legal traditions, *e.g.*, Criminal Code, R.S.C. ch. C-46, § 193(1) (Can. 1985); Telecommunications (Interception) Act of 1979, § 63 (Austr.). In any event, any difference between the treatment of mail theft (which requires a physical invasion) and technological incursions into wire and electronic communications (which can be conducted from a remote location, see U.S. Br. 37-38 n.12), is easily explained by the greater difficulty of detecting and prosecuting the latter. See p. 13 & note 11, *supra*.

2. Title III's prohibition on the use and disclosure of illegally intercepted communications also minimizes the injury caused by those illegal interceptions that do occur. U.S. Br. 34, 39. As this Court has explained, the disclosure of illegally intercepted communications "compounds the statutorily proscribed invasion." *Gelbard* v. *United States*, 408 U.S. 41, 52 (1972). The mere threat of widespread dissemination, moreover, chills free expression in private conversation. U.S. Br. 34-35.

Respondents argue that those compounded injuries result from the "communicative impact" of speech and, therefore, are neither content neutral nor "unrelated to the suppression of free expression." See, *e.g.*, Vopper Br. 25 n.16 (justification rests "on the impact of the communication's content" on listeners "and the consequent injury" to the victims of interception); Yocum Br. 25, 27. Those arguments echo respondents' mistaken claims regarding content neutrality. Title III is not concerned with the content of a communication, and the impact of such content on listeners is irrelevant. See pp. 2-4, *supra*. The disclosure in this case, for example, was proscribed without regard to the public's reaction, and liability would in no way depend on the existence, nature, or scope of communicative impact or listener reaction. Nor does Title III have the goal of "protecting people from the embarrassment" of disclosure, Liberty Proj. Br. 23-24. Title III would not have proscribed disclosure of the communication here if it had been obtained by lawful means. Title III thus is indifferent to communicative impact; it is the impact of the unlawful source that is Title III's focus.[12]

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[12] Nor does it matter that Title III's legislative history identifies particular examples of private matters that, if disclosed, might cause par-

Respondent Yocum errs similarly when he asserts (Br. 27) that Title III's prohibition is justified by communicative impact because it "rests on the sense of 'violation' that arises from the disclosure of one's communication." The sense of violation that is relevant under Title III does not result from *communicative* impact, but rather from the impact of there having been an *invasion* into a zone we rightfully expect to be private, *e.g.*, into private telephone conversations that everyone is "entitled to assume * * * will not be broadcast to the world." See *Katz* v. *United States*, 389 U.S. 347, 352 (1967). Any invasion into that zone is rendered more serious and more chilling of speech when additional people eavesdrop in the first instance, regardless of the communication's content or the listeners' reaction; and the same is true when additional people are enabled to "eavesdrop" after the fact by the conversation's later publication. Thus, far from being justified by communicative impact, Title III is justified by the invasive and chilling effect of having additional eavesdroppers invade conversational privacy—whether in the first instance or on a time-delayed basis through rebroadcast—wholly apart from the communication's content or anyone's reaction to it.

For those reasons, Amicus Liberty Project is incorrect to assert (Br. 20) that, if Title III were upheld, Congress could

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ticular harm to victims of unlawful interceptions. See Yocum Br. 48 (noting Congress's concern that "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns" might be intercepted and exposed); WFAA-TV Br. 20-21. Those are just examples of the sorts of speech that might be intercepted; the legislative history indicates Congress's awareness that illegal interception is used in other contexts as well. See *Hearings on Invasion of Privacy Before the Subcomm. on Administrative Practice and Procedure of the Sen. Judiciary Comm.*, 89th Cong., 1st Sess. Pt. 5, at 2261 (1966) (three major areas of widespread private electronic surveillance were "(1) industrial (2) divorce cases, and (3) politics"). Most important, Congress never suggested that it was concerned solely with those subjects, and it passed a law covering all intercepted communications, regardless of content.

also bar "critical" or "vicious reviews" that might "deter authors from writing." The rationale underlying *that* bar would be content based, because it would depend on the listeners' reaction to the review's message, and not (like Title III) on the injury caused by *the unlawful source*. For the same reason, respondents' reliance (Vopper Br. 25 n.16) on *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992), is misplaced. In that case, this Court invalidated a parade permit ordinance where fees were assessed based on the likelihood of hostile crowd reaction; the "[l]isteners' reaction to speech," the Court explained, "is not a content-neutral basis for regulation." See also *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Title III, in contrast, is indifferent to listener reaction. Its prohibition instead is justified—without respect to the communication's content or the way listeners respond—by the chilling effect that illegal interception and disclosure has on the willingness of people to communicate in the first instance.[13]

3. Finally, respondents assert that Title III is not "narrowly tailored." There are, they contend, alternative means of preserving conversational privacy, such as use of digital wireless telephones. Yocum Br. 13-14 & nn.5-8; Vopper Br. 44-45. But the rule respondents propose—that the First Amendment guarantee their right to publish the contents of stolen conversations so long as they did not encourage or participate in the initial illegal interception—is not linked to the nature of telephone technology. To the contrary, it would prevent Congress from barring disclosure even where there are no reasonable means of preventing intrusion, such

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[13] Nor can the government's interest in promoting private (rather than public) communication be dismissed (*e.g.*, Liberty Proj. Br. 13 n.4, 16) as illegitimate. In *Harper & Row*, this Court recognized the right *not* to speak publicly—whether or not in anticipation of later release—as a "countervailing First Amendment value" to speech in its "affirmative aspect." 471 U.S. at 559, 560. See also p. 9 & note 6, *supra* (common law copyright protects right not to publish).

as where the wiretapper invades the home and plants a bug; uses a laser listening device on a window to hear conversations inside; or pierces a state-of-the-art computer "firewall" to intercept private e-mails. See U.S. Br. 37 & n.12.

In any event, respondents misunderstand wireless telephone technology. While they praise the modern digital telephone, this case concerns an interception that occurred in *1993*, at a time when digital telephones were expensive and not supported in most areas.[14] Even today, almost half of all wireless telephone users still rely on analog technology, Yocum Br. 14 n.7, and many have no choice: 50% of this Nation's land (containing over ten percent of its population) is not covered by a digital network.[15] The current availability of superior (although not foolproof) technology to urban dwellers does not deprive Congress of its power to protect the conversational privacy of those who live in (or visit) rural areas. And the fact that privacy-preserving technology may be superior to privacy-invading technology at any moment cannot prevent Congress from legislating in case the tables are turned. Even now, "digital cellular and PCS are not immune from eavesdropping," H.R. Rep. No. 725, 106th Cong., 2d Sess. 10 (2000), and the privacy of those technologies is increasingly under attack.[16]

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[14] Contrary to Vopper's claim (Br. 4-5), the evidence before Congress when it amended Title III in 1986 hardly demonstrated "an array" of affordable privacy-protection devices. The evidence showed effective alternatives to be "very costly" and available only "down the road." *Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Sen. Judiciary Comm.: Electronic Communications Privacy Act*, 99th Cong., 1st & 2d Sess. 39, 103, 206-207 (1985-1986).

[15] Compare *Fifth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC No. 00-289 (Aug. 3, 2000), at F-2 (Map 1 showing wireless coverage) with *id.* at F-3 through F-6 (Maps 2-5 showing coverage of digital technologies, TDMA, CDMA, GSM, and iDEN).

[16] H.R. Rep. No. 24, 106th Cong., 1st Sess. 2 (1999); J. Sandberg, *Weakness Is Found in Digital Phone System*, Wall St. J. Europe, Apr. 14, 1998, at 8; *Cryptographers Crack Digital Cellular Code*, Communications

Alternatively, respondents argue that Title III's prohibitions are overinclusive because they prohibit the dissemination of matters that are not truly "private or personal," Yocum Br. 26, and may apply to some members of the public who do not care if their calls are intercepted, *id.* at 25 n.13. If the statute limited itself to personal matters, however, respondents would surely argue that the statute is content based. In any event, respondents' claim of overinclusiveness stems from their failure to grasp Title III's purpose, which is not to protect "private or personal" facts, but to protect a zone of conversational privacy. In that respect, Title III is perfectly tailored. If the communication is obtained from that zone through an unlawful interception, it is subject to Title III's strictures; but if it is obtained by other means, *e.g.*, if it is overheard because one participant is speaking in public, Yocum Br. 25, it is not. Nor does Title III apply to speech that already has been broadly disseminated, Vopper Br. 45; Yocum Br. 37. Consistent with Title III's legislative history, U.S. Br. 44, the term "disclose[]" in Section 2511(1)(c) includes a requirement that the matter previously not be publicly known. See *Black's Law Dictionary* 417 (5th ed. 1978) (defining "disclose" as to "bring into view by uncovering").[17]

Today, Mar. 21, 1997; P. Rubin, *Sure It's Secure—But Is It Really Safe? Encryption Algorithms for CDMA and TDMA Are Proving Disturbingly Easy to Crack*, tele.com (McGraw Hill May 1, 1997) (avail. 1997 WL 18325455) (noting that "researchers cracked the messaging encryption algorithm used in U.S.-based CDMA and TDMA digital cellular networks"; current technology does not "protect a digital cellular user against a well-funded adversary").

[17] Respondent Yocum (Br. 31) notes that Title III prohibits disclosure of unlawfully intercepted communications even to the police, notwithstanding society's compelling interest in preventing crime. That is an odd point for respondent to make, since he did *not* take the tapes to the police. And while Title III does reflect Congress's deliberate preference for preserving the privacy of communications over disclosure even for important and socially valuable purposes (see U.S. Br. 24), the traditional defense of "necessity" privileges conduct that is necessary to protect lives where (as

Finally, respondents argue that Title III is unconstitutional because it may "chill" the reporting of matters of public concern. The claim is overstated. Even though Title III has been in place for 32 years, respondents cite not one instance in which any responsible news agency has been chilled with respect to its reporting; nor does it appear that the zeal of news reporting has been adversely affected. See *Branzburg* v. *Hayes*, 408 U.S. 665, 693 (1972) (declining to recognize First Amendment source privilege for reporters where "the evidence fails to demonstrate there would be significant constriction of the flow of news" absent the privilege). Moreover, while respondents' claims (*e.g.*, Yocum Br. 32; Vopper Br. 45) are based on Title III's supposed breadth, respondents give insufficient weight to Title III's scienter requirement. See U.S. Br. 45-46. Title III's prohibition applies only to those who either have actual knowledge of the nature of the interception or actual knowledge of facts that make those origins "so highly probable that" one should assume such to be true. Restatement (Second) of Torts § 12, cmt. a (1965). Indeed, the facts surrounding the interception must be apparent, because Title III imposes no duty of inquiry. *Ibid.*; U.S. Br. 45-46. Consequently, Title III does not deter (and for the past three decades has not deterred) the press from reporting the news. Far from requiring reporters to research sources for fear of illegality, it merely requires them to refrain from use if they know or all but know that the source was an unlawful interception.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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here) the defense is not foreclosed by statute. 1 LaFave & Scott, *supra*, § 5.4, at 627-629.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

APPENDIX

Use and Disclosure Cases—18 U.S.C. 2511(1)(c), (d) (listed in Vopper Br. App. 9a-13a)

1. *Asmar* v. *Detroit News, Inc.*, Nos. 87-1037 & 1150, 836 F.2d 1347 (6th Cir. 1988) (Table) (anonymously recorded call of conversation revealing bribery by competing contractor sent to newspaper and government contractor).

2. *Bartnicki* v. *Vopper*, 200 F.3d 109 (3d Cir. 1999).

3. *Bast* v. *Cohen, Dunn & Sinclair, PC*, 59 F.3d 492 (4th Cir. 1995) (suit arising out of dissolution of extramarital affair and business relationship, during which one partner allegedly recorded telephone conversations of another without consent).

4. *Beiter* v. *Kitto*, No. 99-1020-KL, 2000 WL 884706 (D. Or. July 5, 2000) (cordless telephone conversations intercepted by neighbors and disseminated to other neighbors, who used the contents to harass plaintiffs).

5. *Berry* v. *Funk*, 146 F.3d 1003 (D.C. Cir. 1988) (suit by former Acting Assistant Secretary of State against State Department officials for monitoring phone calls routed through the Department's Operations Center, and for using and disclosing the contents of the calls in investigation during the Clinton passport probe).

6. *Boddie* v. *American Broadcasting Cos., Inc.*, 881 F.2d 267 (6th Cir. 1989) (suit under pre-1986 version of Title III against broadcaster, reporter, and producers of television news program that aired secretly videotaped interview with plaintiff after she consented to an off-camera interview).

7. *Boehner* v. *McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (suit by Republican Member of Congress against Democrat Member of Congress after Florida couple, using a mobile police scanner and tailing plaintiff's car, recorded a cellular telephone call containing politically damaging information and gave copies of the tape to defendant, who in turn released it to the press).

8. *Brooks* v. *American Broadcasting Cos., Inc.*, 999 F.2d 167 (6th Cir. 1993) (suit arising out of alleged "ambush" interview by Geraldo Rivera; motion for leave to add Title III claim properly denied because there was no unlawful interception within the meaning of Title III).

9. *Campbell* v. *Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998) (ex-husband secretly recorded plaintiff's phone conversations with daughter and disclosed contents to his lawyer and daughter's counselor, both of whom disclosed and used the calls' contents in custody proceedings).

10. *Chandler* v. *United States Army*, 125 F.3d 1296 (9th Cir. 1997) (suit by Army Captain after being disciplined based on recordings of illegally intercepted conversations recorded by plaintiff's wife and disclosed to Army officials, who in turn used them to investigate and discipline plaintiff).

11. *Davis* v. *Zirkelbach*, 149 F.3d 614 (7th Cir. 1998) (police and city officials used contents of a phone call, which had been secretly recorded by plaintiff's employer, to persuade witness to cooperate in their investigation of plaintiff's narcotics trafficking).

12. *Deal* v. *Spears*, 980 F.2d 1153 (8th Cir. 1992) (liquor store employee sued employers, who had secretly installed a recording device on the store's phone to confirm suspicions

that plaintiff was involved in a store robbery, but instead discovered and disclosed plaintiff's extramarital affair).

13. *Desilets* v. *Wal-Mart Stores, Inc.*, 171 F.3d 711 (1st Cir. 1999) (suit by employees against employer based on management's covert recording of night-shift phone conversations).

14. *Dorris* v. *Absher*, 959 F. Supp. 813 (M.D. Tenn. 1997) (suit by employees after supervisor secretly recorded personal in-office conversations and attempted to use them to terminate the employees).

15. *Epps* v. *St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986) (suit by emergency medical workers against hospital and co-workers after plaintiffs' phone conversation was recorded by another employee using the ambulance dispatch console and the contents were disclosed and used).

16. *Farberware, Inc.* v. *Groben*, No. 89 Civ. 6240(PKL), 1995 WL 590464 (S.D.N.Y. Oct. 5, 1995) (no facts provided; default judgment).

17. *First* v. *Stark County Bd. of Comm'rs*, No. 99-3547, 2000 WL 1478389 (6th Cir. Oct. 4, 2000) (suit by Sheriff's Department dispatchers after contents of conversation among dispatchers—automatically recorded by emergency call system—were used in a disciplinary proceeding).

18. *Forsyth* v. *Barr*, 19 F.3d 1527 (5th Cir. 1994) (suit by plaintiff police officers after their intercepted conversations with an informant were used and disclosed in an internal affairs investigation; calls were intercepted by the informant's neighbors, who had been feuding with the informant).

19. *Freeman* v. *Ramada Inn, Inc.*, No. 83-3912, 805 F.2d 1034 (6th Cir. 1986) (Table) (suit by convicted robber against

police and hotel; hotel had rerouted call placed by robber to his accomplice (a hotel guest) to a police officer, and the call's contents were later used in prosecuting the robber).

20. *Fultz* v. *Gilliam*, 942 F.2d 396 (6th Cir. 1991) (suit against ex-husband, who had recorded plaintiff's phone conversations with her boyfriend and played the tapes for her brother, the couple's pastor, and their daughter).

21. *Gaubert* v. *Gaubert*, No. 97-1673, 1999 WL 10384 (E.D. La. Jan. 7, 1999) (suit against ex-husband for recording wife's conversations on home phone and disclosing contents to their children and others).

22. *Gentry* v. *E.I. DuPont De Nemours and Co., Inc.*, No. CA- 765, 1987 WL 15854 (Tenn. Ct. App. Aug. 18, 1987) (suit by night janitor against employer after plaintiff was disciplined for receiving a personal phone call from a union organizer at work, in violation of company policy; call had been inadvertently recorded by defendant's telephone answering machine).

23. *Goode* v. *Goode*, No. 99-423-SLR, 2000 WL 291541 (D. Del. Mar. 14, 2000) (suit by ex-wife against ex-husband and his lawyer for intercepting and recording their phone conversations, and for disclosing and using the contents of those communications in divorce proceedings; suit dismissed because Title III permitted husband, as party to the communications, to record them).

24. *Griggs-Ryan* v. *Smith*, 904 F.2d 112 (1st Cir. 1990) (suit by tenant against landlady with whom he shared telephone line, after landlady listened to phone call implicating tenant in drug trafficking and disclosed the contents to the authorities; plaintiff held to have consented to monitoring, since he had been told that all calls were monitored).

25. *Hatchigan* v. *International Bhd. of Elec. Workers, Local Union No. 98*, No. 87-7131, 1990 WL 2795 (E.D. Pa. Jan. 17, 1990) (recording of phone conversations between union officer and union member concerning wage dispute; court held that no illegal interception had occurred, since a party to the conversation had made the recording).

26. *Hodge* v. *Mountain States Tel. and Tel. Co.*, 555 F.2d 254 (9th Cir. 1977) (suit against phone company for installation of pen register at behest of police properly dismissed because Section 2511(1) does not apply to pen registers).

27. *Janecka* v. *Franklin*, 684 F. Supp. 24 (S.D.N.Y. 1987) (suit by ex-wife against husband for recording telephone conversations between her and their minor children).

28. *Kempf* v. *Kempf*, 868 F.2d 970 (8th Cir. 1989) (suit by ex- wife against former husband who had recorded calls between wife and those with whom she was having extramarital affairs, and who had used the recordings in dissolution proceedings).

29. *Kirkland* v. *Franco*, 92 F. Supp. 2d 578 (E.D. La 2000) (suit by ex-wife against husband who, suspecting marital infidelity, had recorded her telephone calls during the marriage, confronted her with the tapes, and then discussed them with her pastor, employer, mother, and during a child-custody hearing).

30. *Kratz* v. *Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) (suit by wife and her lover against her husband and his lawyer, where husband had tapped the household telephone to gather information on alleged infidelity and had used the tape to gather information for divorce proceeding).

31. *Kreish* v. *Michigan Bell Tel. Co.*, No. 94-2130, 57 F.3d 1069 (6th Cir. 1995) (Table) (suit alleging telephone company had disclosed contents of plaintiff's conversations to others; summary judgment granted based on lack of evidence).

32. *Leach* v. *Byram*, 68 F. Supp. 2d 1072 (D. Minn. 1999) (during dispute concerning dissolution of a family business, father intercepted plaintiff son's portable telephone conversations, recorded them, and turned them over to his attorney; son sued father's attorney, who used and relied on the recordings in a letter to the son's attorney).

33. *Lizza* v. *Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986) (suit by wife and a third party against husband, where husband had recorded calls on their household telephone to gather information useful in pending divorce proceeding).

34. *Mayes* v. *LIN Television of Texas, Inc.*, No. 96-CV-0396-X, 1998 WL 665088 (N.D. Tex. Sept. 22, 1998) (anonymously recorded telephone conversation of politician delivered to politician's opponents, who distributed copies of politically damaging conversation to the media; call may have been intercepted by ex-wife of one of the call's participants).

35. *Meharg* v. *Poznick*, No. 96-1074, 111 F.3d 129 (4th Cir. 1997) (Table) (no facts provided).

36. *Nalley* v. *Nalley*, 53 F. 3d 649 (4th Cir. 1995) (suit by husband against wife, where anonymous source had sent wife a recording of husband's telephone conversations, revealing extra-marital affair; wife played the recordings for her children, for her attorney, and for the husband of the woman with whom her husband was having the affair).

37. *Natoli* v. *Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. 1993) (defendants alleged to have recorded plaintiff's phone calls and provided the recordings to the media defendants "to obtain political, economic, and other advantage at plaintiff's expense").

38. *Newcomb* v. *Ingle*, 944 F.2d 1534 (10th Cir. 1991) (suit by child against his mother because she recorded a conversation during which the child's father instructed the child as he set fire to the family home).

39. *Noel* v. *Hall*, No. 99-649-AS, 2000 WL 1364227 (D. Or. Sept. 15, 2000) (after plaintiff recorded his own phone conversations, former business partner allegedly broke into business, copied the tapes, listened to them, shared them with others, and then took them to the police).

40. *Peavy* v. *WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000) (telephone calls intercepted and recorded by plaintiff's neighbor, who had been involved in various disputes with plaintiff; neighbor in turn provided tapes to defendant television station, which encouraged additional interceptions).

41. *Pollock* v. *Pollock*, 154 F.3d 601 (6th Cir. 1998) (ex-husband sued former wife for recording phone calls between him and their minor daughter during a custody dispute).

42. *Pritchard* v. *Pritchard*, 732 F.2d 372 (4th Cir. 1984) (suit by ex-husband against former wife where wife had placed a recording device on the family phone to record his telephone calls).

43. *Quigley* v. *Rosenthal*, 43 F. Supp. 2d 1163 (D. Colo. 1999) (suit against neighbors who allegedly, as part of a

campaign to defame the plaintiffs, intercepted, recorded, and disclosed the contents of the plaintiffs' cordless phone calls).

44. *Reynolds* v. *Spears*, 857 F. Supp. 1341 (W.D. Ark. 1994) (companion case to *Deal* v. *Spears*, *supra*; holding that wife of business owner was not liable merely because she overheard recordings of conversations as her husband listened to them).

45. *Rice* v. *Rice*, No. 98-0806-CV-W-3, 1990 WL 357332 (W.D. Mo. Sept. 4, 1990) (suit by ex-husband against former wife for recording telephone conversations between him and their children).

46. *Ricupero* v. *Wuliger, Fadel & Beyer*, No. 1:91CV0589, 1994 WL 483871 (N.D. Oh. 1994) (suit by wife against husband and his lawyers, after husband secretly recorded wife's calls on home phone and, discovering her extra-marital affair, disclosed the tapes to his lawyers for use in divorce proceedings).

47. *Rodgers* v. *Wood*, 910 F.2d 444 (7th Cir. 1990) (suit by police officers after suspect recorded call they made from the suspect's home; call was disclosed by suspect's attorney in court, to other police officers, and to the Assistant District Attorney).

48. *S.L.* v. *Friends Central High School*, No. Civ.A.00-472, 2000 WL 352367 (E.D. Pa. Apr. 5, 2000) (transcript of plaintiff's e-mail exchange with another student, printed out by the other student and used to discipline plaintiff, held not to have been unlawfully intercepted).

49. *Sands* v. *Crist*, No. 89-15502, 892 F.2d 1046 (9th Cir. 1989) (Table) (suit by prisoner alleging that prison monitored his phone calls dismissed based on prisoner's consent).

50. *Scheib* v. *Grant*, 22 F.3d 149 (7th Cir. 1994) (suit by ex- wife against former husband's attorneys, where husband had recorded her phone calls with their son, disclosed them to his attorneys, and the attorneys had attempted to introduce them at a hearing on a custody settlement).

51. *Sheinbrot* v. *Pfeffer*, Nos. 93 CV 5343, 94 CV 0649, 1995 WL 432608 (E.D.N.Y. July 12, 1995) (suit by physicians against former employee radiologist, who had listened to their phone calls at the office).

52. *Smith* v. *City of Hartford*, No. X07CV 980070792S, 2000 WL 1058877 (Conn. Super. Jul. 14, 2000) (city, firefighters union, and others allegedly used radio scanner to intercept and record plaintiff's calls).

53. *Spetalieri* v. *Kavanaugh*, 36 F. Supp. 2d 92 (N.D.N.Y. 1998) (suit by police administrator against individual who used scanner to intercept and record plaintiff's phone conversation, and against employer that, after receiving the tapes, used them to investigate and discipline plaintiff).

54. *Thompson* v. *Dulaney*, 838 F. Supp. 1535 (D. Ut. 1993) (suit against former wife, her parents, her expert witnesses, and her lawyers where ex-wife taped ex-husband's phone conversations with their children for use in divorce proceedings).

55. *Weeks* v. *Union Camp Corp.*, 215 F.3d 1323 (Table) (suit by employees against former employer, who had relied on tape of illegally intercepted conversation to dismiss them; tape of conversation had been made when another employee concealed a tape recorder in the workplace, near plaintiffs, in order to intercept their conversations).

56. *Wesley College* v. *Pitts*, 974 F. Supp. 375 (D. De. 1997) (suit by college against former clerical employee, former faculty member, and current faculty member, where college president was sent unmarked envelope containing hard copies of sensitive e-mails the president had authored).

57. *Williams* v. *Poulos*, 11 F.3d 271 (1st Cir. 1993) (granting injunction against further use or disclosure of illegally intercepted calls where owners of company in bankruptcy had recorded employee phone calls, including calls made by officers of venture capital group taking over the bankrupt company, and then used information in the tapes for litigation purposes).

58. *United States* v. *Anaya*, 779 F.2d 532 (9th Cir. 1985) (prosecution of police officers for placing a bug and recording the proceedings of a closed executive session of the city council).

59. *United States* v. *Harpel*, 493 F.2d 346 (10th Cir. 1974) (prosecution of police officer for twice playing—for certain individuals in a bar—recording of an illegally intercepted conversation between other law enforcement officers; evidence insufficient to establish who had made the illegal recording in the first instance).

60. *United States* v. *Jones*, 580 F.2d 219 (6th Cir. 1978) (prosecution for illegal interception and use of estranged wife's calls).

61. *United States* v. *Landrum*, 93 F.3d 122 (4th Cir. 1996) (suit by prisoner seeking collateral relief after he was convicted of, among other things, intercepting his wife's phone calls and using the contents in violation of Sections 2511(1)(a) and (c)).

62. *United States* v. *Newman*, 476 F.2d 733 (3d Cir. 1973) (affirming conviction and sentence of former city councilman who willfully procured a phone company employee to illegally intercept and record the phone calls of his opponents so as to provide him with politically useful information regarding their plans).

63. *Zerilli* v. *Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980) (dismissing suit against law enforcement agents and newspaper where the agents allegedly had disclosed, and the newspaper published articles based on, the contents of communications intercepted by bugging devices in the early 1960s; interceptions pre-dated Title III's enactment).

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In The

Supreme Court of the United States

GLORIA BARTNICKI, *et al.*,

Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,

Respondents.

UNITED STATES,

Petitioner,

v.

FREDRICK W. VOPPER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* REPRESENTATIVE JOHN A. BOEHNER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus John Boehner is a member of the House of Representatives.[1] Representative Boehner has filed suit under 18 U.S.C. § 2511(1)(c) (the "Act") against Representative James McDermott, who has invoked the First Amendment as a defense. Thus, Representative Boehner's suit implicates the same questions presented by petitioners. Additionally, *amicus* submits this brief to present the separate argument that the Act is constitutional as applied to defendants who are public officials, irrespective of its constitutionality as applied to private citizens. A divided panel of the D.C. Circuit, in separate opinions, rejected the First Amendment challenge to the Act. The court of appeals declined to hear the case *en banc*, and a petition for certiorari is pending, *McDermott v. Boehner*, No. 99-1709 (U.S. Apr. 25, 2000).

After illegally intercepting Representative Boehner's telephone conversation with the House Republican leadership over a police scanner, John and Alice Martin met with Democratic Representative Karen Thurman of Florida to discuss the tape and the possibility of receiving immunity for their illegal conduct. Appendix to Petition for a Writ of Certiorari 3a, *McDermott v. Boehner*, No. 99-1709 (U.S. Apr. 25, 2000) ("Mc. Pet. App."). At Representative Thurman's suggestion, the Martins personally delivered the tape on January 8, 1997, to Representative McDermott in his capacity as the ranking member of the House Ethics Committee. Mc. Pet. App. 3a. The Martins' cover letter that accompanied the tape put Representative McDermott on notice of its illegal provenance by stating that the tape contained "a conference call heard over a scanner." Mc. Pet. App. 3a.

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[1] Representative Boehner has received the written consent of all the parties to this action to file this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The letter also indicated that the Martins were under the impression that they would "be granted immunity." Mc. Pet. App. 3a. As Judge Randolph noted, this reference to a promise of immunity gives rise to an inference that the "transaction may have involved a *quid pro quo*" and that McDermott is the "obvious candidate" to have brokered this "illegal transaction." Mc. Pet. App. 23a.

The next day, Representative McDermott gave copies of the tape to *The New York Times*, *The Atlanta Journal-Constitution*, and *Roll Call*. Mc. Pet. App. 3a. The following day, January 10, 1997, *The New York Times* ran a front-page story that included a verbatim transcript of a portion of the illegally intercepted conversation. *The Times* reported that it had received the tape from a "Democratic Congressman hostile to Mr. Gingrich [and who] insisted that he not be identified further." Mc. Pet. App. 6a. Thus, there can be little doubt that Representative McDermott himself distributed copies of the tape to the media. Representative McDermott's distribution of the tape constituted a violation of the Rules of the House Ethics Committee and, consequently, he resigned from that Committee on January 13, 1997.[2]

SUMMARY OF ARGUMENT

The central premise of respondents' challenge to the Act is that there is a First Amendment right to distribute other persons' speech that has been stolen. Such a rule would be antithetical to the core First Amendment principle that free and candid private exchanges are to be

---

[2] Notwithstanding the unfounded suggestions made by Representative McDermott, the contents of the tape did not suggest apparent "official misconduct." Rather, as the court of appeals recited, "[t]he participants discussed strategy regarding an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the committee's promise not to hold a hearing." Mc. Pet. App. 3a. Plainly, there is nothing improper about such a conversation.

encouraged. In the absence of the Act's prohibition on the dissemination of illegally intercepted speech, free speech would be chilled by the fear of subsequent public disclosure of private communications. Thus, while the parties will debate the appropriate level of scrutiny to be applied in this challenge to the Act's constitutionality, the essential point is that there is no First Amendment right to distribute someone else's pilfered speech.

This Court's precedents confirm this unassailable proposition. The Court has uniformly upheld content-neutral restrictions on the dissemination of lawfully-obtained, truthful information – particularly other person's speech – in a variety of contexts, including copyrighted material, insider information, the existence of a wiretap, or a religious group's membership list obtained in civil discovery.

The Court's decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), is not to the contrary. In that case, the Court simply held that strict scrutiny was appropriate for a *content-based* restriction on the media's *republication* of a private embarrassing *fact* provided to the newspaper by the *government*. *Florida Star* has no relevance to the instant cases because the analysis there extended only to information that was "lawfully obtained." 491 U.S. at 533. Representative McDermott and respondents did not lawfully obtain tapes they disclosed because they came into possession of them through illegal transactions. Specifically, it was illegal for the defendants' sources to intercept the conversation and also illegal for them to disclose the conversation to defendants. In addition, the statute in *Florida Star* was content-based while the Act is plainly content-neutral, and unlike the Florida statute, which advanced no First Amendment interest, the Act promotes the First Amendment interest in preserving citizens' right to free and candid private discussion. In light of this important governmental interest which the Act serves, there is no doubt that it satisfies intermediate scrutiny, which is the most stringent standard of scrutiny that could be reasonably applied to the Act. In any event, under this Court's decision in *United States v. Aguilar*, 515 U.S. 593, 606 (1995),

the Act plainly may be applied to Representative McDermott because he is a public official upon whom special duties of nondisclosure may be imposed.

ARGUMENT

I. There Is No First Amendment Right To Disseminate Someone Else's Stolen Speech.

The Third Circuit's invalidation of the Act's disclosure prohibition necessarily rests on a fundamentally erroneous premise: the notion that there is a First Amendment right to publicly disclose *someone else's* stolen private speech that is even roughly analogous to the right to engage in one's *own* speech. But the two situations are not remotely comparable, and the Court has never treated them as such. The fact that a book reviewer has a virtually absolute First Amendment right to criticize *The Catcher in the Rye* in no way suggests that he has any right to "fence" bootleg copies of J.D. Salinger's book. Or, to use a case the Court has already decided, the fact that *The Nation* magazine has a virtually absolute right to offer its own opinions or facts about former President Ford in no way suggests that it may disclose copies of President Ford's copyrighted speech. *Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. 539 (1985). Even more obviously, no one has a First Amendment right to disclose the *private* conversations of Mr. Salinger or President Ford, regardless of whether those conversations concern mundane domestic matters or important affairs of state.

This is because, while prohibiting a citizen from engaging in his own speech conflicts with core First Amendment values, a prohibition against disclosing other persons' stolen speech advances and facilitates important First Amendment values. The societal interest in preserving the confidentiality of private conversations, in other words, is itself an important First Amendment interest. There is a well-recognized First Amendment "freedom *not* to speak publicly." *Id.* at 559 (emphasis in original). Absent an ability to keep private speech private, citizens will be

chilled in such conversations and refrain from speech they would otherwise engage in, for fear of public disclosure.

Thus, the First Amendment respects and protects the speaker's interest in selecting and limiting the audience that will receive his message. For example, under copyright laws and state common law analogues, a speaker may limit his audience to paying customers. *See Harper & Row*, 471 U.S. 539; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). Just as a "corollary of the right to associate is the right not to associate" with unwanted members, a corollary of the right to speak is a "First Amendment right to exclude" an unwanted audience from hearing the speech. *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408-09 (2000). *See also Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2451 (2000) (The " '[f]reedom of association . . . plainly presupposes a freedom not to associate' " and thus "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association.") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). Just as exposure of those who privately belong to a controversial organization has a "deterrent effect" on one's right to associate, so too does public exposure of one's private speech "chill" that speech. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). *See id.* at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."). Just as the appropriation of one's copyrighted speech will lead to less speech because it eliminates the speaker's "economic incentive," so too does appropriation of private conversations deter the candid, private flow of information. *Harper & Row*, 471 U.S. at 558.

Thus, prohibiting the unwanted disclosure of private speech furthers free expression by avoiding the chill on private speech that necessarily is engendered when it is made public to persons the speaker has deliberately sought to exclude. This is, of course, precisely the reason that certain important private conversations – with attorneys or clergy or the like – are absolutely privileged against disclosure, even though such privileges frustrate

society's compelling interest in uncovering even heinous criminal activity. Indeed, the text of the Constitution itself, in the Speech and Debate Clause, protects the conversation illegally disclosed by Representative McDermott here precisely to avoid chilling candid conversation about important legislative matters. *See* U.S. CONST. art. I, § 6; *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951). *See also Nixon v. United States*, 418 U.S. 683, 708 (1974) ("The expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.").

Thus, society has a *stronger* interest in protecting conversations among congressional leaders, or the President and his advisers, than it does in more mundane conversations among private citizens, even though the public is more "interested" in the content of these official conversations. The reason that such conversations are of special "public interest" is precisely the same reason they have special protections: they involve important matters of state. Consequently, the cost of chilling such conversations is proportionately higher. Since the Constitution itself commands that congressional conversations not be exposed regardless of society's interest in knowing the content of the conversations, the Constitution has already established that the need for confidentiality in such conversations outweighs any public interest in uncovering them.

Moreover, although speech amongst public leaders is entitled to special protection against unwelcome surveillance and disclosure, the government has a paramount interest in so protecting *all* conversations in circumstances where citizens have a reasonable expectation of privacy. Protection of such private conversations is an integral part of the "broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' " *Hill v.*

Colorado, 120 S. Ct. 2480, 2489 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). This interest is shattered by either public or private eavesdroppers, as well as those who disclose the fruits of such surreptitious surveillance. Indeed, since the Constitution itself forbids public actors from eavesdropping on private telephone conversations, and forbids the subsequent disclosure of those conversations in judicial proceedings, it inexorably follows that government has a compelling interest in preventing the disclosure of such conversations by private actors. *See Katz v. United States*, 389 U.S. 347 (1967).

In short, the Act's prohibition against unauthorized disclosure of private conversation facilitates *more* speech and thus enhances the free flow of information and ideas that the First Amendment was designed to nurture and protect. For this reason, it would be contrary to important First Amendment values to constitutionally immunize those who disclose others' private conversations. Representative McDermott has an absolute right to offer his own opinions or facts about the House Republican leadership because, under the First Amendment, McDermott is master of his own speech. But, under the First Amendment, Representative Boehner is also the master of *his* speech and Representative McDermott's disclosure denies him the freedom not to speak publicly. Thus, McDermott's disclosure harms important First Amendment values by chilling Boehner's private speech. On the other hand, McDermott has no cognizable First Amendment right to disclose Boehner's speech because he obtained it only in violation of a law that even McDermott concedes is perfectly constitutional, *i.e.*, the Act's prohibition against the Martin's disclosing their illegally-intercepted conversation to McDermott or anyone else. Indeed, McDermott has no greater First Amendment "right" to disclose the tape of the purloined phone call than does one who "fences" videotapes or books without the creator's consent. For, unlike an *authorized* bookseller or tape vendor, those who disclose the *stolen* speech of others do so at the expense of the

creator's right to select and limit his audience. Consequently, there is no coherent weighing of Eirst Amendment interests that would lead to invalidation of the Act.

Indeed, both McDermott and the Third Circuit effectively concede this basic point. Both seem to agree that the government may prohibit disclosure of illegally-intercepted speech, so long as the disclosure prohibition is applied to those, like the Martins, who illegally intercepted the phone call. Mc. Pet. App. 30a (Ginsburg, J., concurring); *Bartnicki v. Vopper,* 200 F.3d 109, 115-16 (3d Cir. 1999). This concession is fatal. Since the government may *separately* punish the thief for disclosing the phone call (in addition to punishing the interception), it certainly can also prohibit a "fence" from engaging in precisely the same disclosure. There is no coherent reason to erect separate rules for the thief and the fence. The thief has the same First Amendment rights as the fence, since there is no "bad person" exception to the First Amendment. The fence, like the thief, knows the phone call was illegally intercepted and possesses a tape of the call only by virtue of the thief's dual illegalities. Precisely the same societal interest in confidentiality is furthered by prohibiting the fence's disclosure as is furthered by preventing the thief's disclosure. Consequently, since all agree thaf the government may constitutionally prohibit the thief from disclosing the call, then it necessarily may also prohibit the fence from doing so.

All of the foregoing is plainly and firmly established by this Court's precedent. The Court has uniformly upheld every content-neutral prohibition against disclosing information that was obtained, as here, either through an illegal transaction or pursuant to a duty of nondisclosure. The Court has only invalidated content-based statutes prohibiting the republication of information that the discloser was not prohibited from obtaining and/or that was provided to the discloser by the government itself.

II. This Court's Precedents Establish The Act's Constitutionality.

The Court's decision in *Harper & Row,* on all fours with the instant case, conclusively demonstrates that the Act is fully constitutional. There, an unnamed source had given *The Nation* magazine a "purloined" copy of President Ford's then-unpublished autobiography and *The Nation* immediately published substantial excerpts. 471 U.S. at 542. *The Nation* argued that its conduct was protected by the First Amendment given the enormous public interest and news value in President Ford's story, particularly his first-hand account of why he had pardoned ex-President Nixon. The Court had no trouble rejecting defendant's First Amendment argument and finding *The Nation* fully liable. 471 U.S. at 555-60.

The Court reasoned that *The Nation*'s disclosure of the copyrighted material violated President Ford's "right not to speak" to an audience beyond that which he had selected. *Id.* at 559. As the Court emphasized:

> "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."

Id. (quoting *Estate of Hemingway v. Random House, Inc.,* 244 N.E.2d 250 (N.Y. 1968)) (emphases in original). Similarly, the Court in *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562 (1977), upheld a damages award against a television station for its broadcast of a "human cannonball" act in a "public interest" news show, where the publication infringed a state law "right of publicity."

Thus, it is clear that the government may prohibit disclosure of other persons' speech, on pain of civil damages, without raising any serious First Amendment concerns. This establishes the Act's constitutionality since all the Act does is extend a copyright over the contents of

phone calls to the participants in the call and requires the payment of civil damages by those who disclose the contents.[3]

Indeed, this is a far easier case than *Harper & Row* or *Zacchini* because those cases did not involve disclosure of speech that was intended to be kept private. The speech in those cases was already, or soon to be, quite public. The only chilling effect of the unauthorized disclosure was to reduce the speaker's financial gain by broadening the audience beyond paying customers. Here, in contrast, the intrusion is far greater since the disclosure publicly reveals speech that was never intended to be public and the chilling effect is not simply monetary.

The Court has also made clear in numerous other contexts that the law may unilaterally prohibit disclosure of lawfully-obtained, truthful information if the nondisclosure requirement focuses on the means by which the information was acquired, rather than its content. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), for example, the Court unanimously upheld a prior restraint on a newspaper's truthful disclosure of a controversial religious group's membership information that had been lawfully obtained through civil discovery. Since the First Amendment permits prohibiting disclosure of private information when it is obtained through lawful civil discovery, *a fortiori* the government may prohibit disclosure of information obtained from one who both illegally acquired it and illegally transmitted it to the discloser. In a multitude of other contexts, the law similarly restricts the disclosure of certain information – grand jury testimony, insider information or trade secrets – and the Court has routinely upheld such duties of nondisclosure.[4] These laws were

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[3] Like the copyright laws, the Act does not limit the disclosure of any "facts" or "ideas," just the content of the phone calls themselves. *See Harper & Row*, 471 U.S. at 560.

[4] *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("Although stealing documents or *private wiretapping* could

constitutional even though they unilaterally imposed a disclosure prohibition on defendants who strenuously resisted the duty of nondisclosure and had not voluntarily assumed any fiduciary duty to the person whose information was being disclosed. *See Harper & Row*, 471 U.S. 539; *Zacchini*, 433 U.S. 562, *Seattle Times*, 467 U.S. 20.

III. *Florida Star* Does Not Apply To A Content-Neutral Ban On Disclosing Private Conversations.

As the foregoing makes clear, it is well-established that it is constitutionally permissible to restrict the truthful disclosure of information when the law permissibly treats that information as confidential, regardless of whether those disclosing the information had themselves illegally obtained it. This is particularly true when the information is another person's speech and the purpose of the confidentiality requirement is to facilitate such speech. In the face of all this, Representative McDermott and respondents nonetheless insist that the line of cases culminating in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), grant a nearly-absolute right to knowingly disclose a tape of someone else's phone call even though it was both illegally obtained and illegally transmitted to the defendant. But *Florida Star* and its predecessors never remotely addressed, much less condemned, the government's authority to preserve the

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provide newsworthy information, *neither reporter nor source* is immune from conviction for such conduct, whatever the impact on the flow of news.") (emphases added); *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (upholding criminal conviction of federal judge for disclosing truthful information about a wiretap that he had lawfully obtained); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (upholding damage award against newspaper publishing the name of its source in violation of common law promissory estoppel doctrine); *United States v. O'Hagan*, 521 U.S. 642 (1997) (upholding criminal conviction for violating insider trading obligations); FED. R. CRIM. P. 6(e) (duty of nondisclosure imposed on those required to serve as grand jurors).

confidentiality of private conversations against the chilling effect caused by their illegal interception and disclosure.

Florida Star held that strict scrutiny was appropriate for a *content-based* restriction on the media's *republication* of a private embarrassing *fact* provided to the newspaper by the *government*. It in no way hinted that there was any constitutional problem with a *content-neutral* restriction against disclosing a private *conversation* that the law concededly was entitled to keep private against all outside interlopers. Rather, *Florida Star* did nothing more than treat information inadvertently made public by the government as equivalent to information deliberately made public. Thus, like all other information lawfully possessed by the media, the government normally could not suppress publication because the information was perceived to have a harmful effect on those exposed to the public glare. But this hardly suggests that there is any First Amendment right to disclose all information, particularly when the information sought to be disclosed is other people's speech, when the reason for the nondisclosure requirement is the content-neutral one of preserving the confidentiality of private conversations, and when the government itself is not responsible for disclosing the speech to defendant.

At the most general level, *Florida Star* cannot establish a general First Amendment freedom to disclose *all* information of public importance because (1) *Florida Star* itself repeatedly and forcefully emphasized that "[o]ur holding today is limited" to the "discrete factual context" presented by that case and (2) any such rule of absolute disclosure would be in irreconcilable conflict with the precedent and clearly constitutional laws discussed above. *Florida Star*, 491 U.S. at 541, 530. *See id.* at 531. More specifically, *Florida Star* does not suggest any constitutional infirmity in the Act for a number of independently dispositive reasons.

A. The Disclosed Tapes Were Not Lawfully Obtained.

Most obviously, *Florida Star* does not apply here because it extends only to information that was "lawfully obtain[ed]." 491 U.S. at 533 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)). Representative McDermott and respondents could not lawfully obtain the tapes they disclosed because they possessed them only through *two* illegal transactions. It was illegal for the defendants' sources to intercept the conversations and also illegal for them to disclose the conversations to the defendants. Mc. Pet. App. 23a-24a; 29a-32a (Ginsburg, J., concurring).

Representative McDermott nonetheless argues that he lawfully obtained the tape because the Act prohibited the sources' transmittal of the tape *to* McDermott, rather than prohibiting his receipt of the tape *from* the sources. Petition for a Writ of Certiorari 20, *McDermott v. Boehner*, No. 99-1709 (U.S. Apr. 25, 2000) ("Mc. Pet."). This silly semantic gamesmanship is contrary to English usage, the Court's clear precedents and any coherent First Amendment jurisprudence.

First, normal English usage establishes that information cannot be "lawfully obtained" if, as here, it can only be obtained unlawfully. It matters not whether it is illegal to give the information to the defendant or for the defendant to receive it – in either instance the information has been acquired or obtained unlawfully. *See* Mc. Pet. App. 30a (Ginsburg, J., concurring). During Prohibition, no one "lawfully obtained" liquor, even though the Eighteenth Amendment prohibited only the "*sale* . . . of intoxicating liquors," not their *receipt* by the consumer. U.S. CONST. amend. XVIII, § 1 (repealed 1933) (emphasis added).

Second, the Court's opinions reflect this common sense understanding of the English language. The Court has made clear that the *Florida Star* principle is inapplicable when the disclosed information did not "lawfully come [into the defendant's] hands." *Aguilar*, 515 U.S. at 605 (citing *Smith*, 443 U.S. at 605). Of course, information does

not lawfully come into the defendant's hands if, as here, the source broke the law when he placed the information in defendant's hands. Similarly, *Florida Star* itself states that where, as here, "sensitive information rests in private hands," government may "forbid its nonconsensual *acquisition*," and any "*information so acquired*" is "outside of the *Daily Mail* principle." 491 U.S. at 534 (emphases added). Thus, *Florida Star* focuses on whether the "*information*" was "acquired" illegally, not on whether it was the defendant or the source who committed the illegal act. More directly, in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991), the Court held that the *Florida Star* line of cases was inapposite because, although it was not illegal for the newspaper to *receive* the source's name that was subsequently disclosed, the newspaper nonetheless had not "obtained Cohen's name 'lawfully' " because it "obtained Cohen's name only by making a promise that they did not honor" – in violation of Minnesota's common law promissory estoppel doctrine. *Id.* at 671. Here, too, "[u]nlike the situation in *Florida Star*, where the rape victim's name was obtained through lawful access to a police report," the disclosers here had no "lawful access" to phone calls they knew had been illegally obtained by a source who was prohibited from disclosing it to them. *Id.*[5]

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[5] Representative McDermott argues that *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), somehow supports his assertion that information illegally transmitted to a defendant is "lawfully obtained" within the meaning of *Florida Star* and his assertion that *Florida Star*'s strict scrutiny standard applies here. Mc. Pet. 17-18. This is a most peculiar argument, however, because the *Landmark* opinion says absolutely nothing about whether the information was lawfully or unlawfully obtained, or its legal significance, and could not do so because "[t]he record in *Landmark* contained no evidence regarding who supplied the newspaper with information or how they obtained it." Mc. Pet. App. 21a (citing *Landmark Communications, Inc. v. Commonwealth*, 233 S.E.2d 120, 123 n.4 (Va. 1977)). To the contrary, the *Landmark* opinion pointedly refused to provide any general answer to the "broader question" expressly reserved in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975), *i.e.*, "whether the publication of truthful information withheld by law from the public domain is . . . privileged" in the same manner as information made publicly available by the government. *Landmark*, 435 U.S. at 840. So there is no reasonable basis for inferring that the *Landmark* opinion in 1978 somehow magically anticipated and resolved the question of what *Florida Star* meant by "lawfully obtained" nine years later, especially since *Landmark* never discussed that issue and *Florida Star* did not even cite *Landmark* as providing general guidance on how to resolve this issue. Indeed, *Landmark* expressly refused to apply *any* "categorical approach," much less *Florida Star*'s strict scrutiny, and based its decision on a "narrow and limited" balancing test confined to "the circumstances of this case." *Landmark*, 435 U.S. at 829, 837, 838, 840. This is why *Florida Star* did not even list *Landmark* as one of the "trilogy of cases" upon which its strict scrutiny test is premised. *See Florida Star*, 491 U.S. at 530.

Third, Representative McDermott's tortured interpretation of what information is "lawfully obtained" is wholly irrational and antithetical to fundamental First Amendment principles. Under his proposed construction, if the Act had prohibited the discloser from *receiving* the purloined tape, then it would not be "lawfully obtained" within the meaning of *Florida Star* and strict scrutiny would therefore not apply. But a law prohibiting *receipt* of illegally intercepted conversations is obviously *broader* than the Act's prohibition on disclosure and is wholly unnecessary to further the government's interest in prohibiting the illicit disclosure of stolen speech. Separately criminalizing McDermott's receipt is not necessary to prevent further disclosure of the purloined tape – prohibiting the source's transmittal accomplished *that*. Thus, additionally criminalizing receipt would be broader than necessary and, of course, the First Amendment discourages such unnecessarily over-inclusive laws. *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect."); *Florida Star*,

491 U.S. at 538. Obviously, then, the Court has not (and should not now) formulate a First Amendment rule that requires McDermott's *more* restrictive alternative. The Court should not compel Congress to pass a law going beyond what is needed to prohibit disclosure of stolen conversations in order to further its interest in prohibiting disclosure of stolen conversations.

Fourth, *Florida Star* itself rejects any interpretation of that opinion as applying to situations where, as here, the source has illegally obtained the information and illegally transmitted it to the discloser. Indeed, the *Florida Star* Court was quite clear that:

> The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a *source*, the government may ever punish not only the unlawful acquisition, but the ensuing *publication* as well . . . we have no occasion to address [that issue] here.

491 U.S. at 535 n.8 (second and third emphases added). Of course, a "source" cannot engage in "publication"; only a "newspaper" can. Thus, by its plain and unambiguous terms, *Florida Star* itself says it is not reaching the question of whether a newspaper could be punished for publishing information acquired unlawfully by the source.[6] *See also Branzburg*, 408 U.S. at 691-92 (no matter how great "the

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[6] For this reason, the footnote cannot rationally be interpreted as reserving only the question of whether the thief himself may be punished for the disclosure, as well as the theft. As the *Boehner* opinion noted, footnote eight's citation to *New York Times Co. v. United States*, 403 U.S. 713 (1971), as not resolving the issue reinforces this reading. In that case, the only question reserved by the Court was whether *The New York Times* could be punished for printing the "Pentagon Papers" that their source, Daniel Ellsberg, had illegally acquired. *See* Mc. Pet, App. 18a-19a. It was clear that *The Times* itself had not stolen the Pentagon Papers, so the case did not implicate the issue of whether a thief could be punished for disclosure, as well as theft.

interest of securing news," the First Amendment "does not reach so far as to override the interest of the public in insuring that *neither* reporter *nor source* is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.") (emphases added). Since the *Florida Star* Court expressly did not decide whether its First Amendment test applied where the source had illegally obtained the information, it obviously did not decide, through an implausible definition of "lawfully obtained," that strict scrutiny applied where the source not only illegally obtained the information, but also illegally transmitted it to the defendant.

Even absent the explicit reservation in footnote eight, it is clear that *Florida Star* could not decide this issue because, in that case, it was not illegal for the source of the information either to obtain it *or* to transmit it to the defendant. The source in *Florida Star* was the police themselves, who obviously lawfully possessed the rape victim's name, and the law plainly did not prohibit them from transmitting it to defendant. Rather, as the *Florida Star* opinion emphasized, the statute simply said that "state officials are not *required* to disclose" such names, but nothing in the law *prohibited* the police – or anyone but the media – from disclosing the name. *See Florida Star*, 491 U.S. at 536, 540 (emphasis added). *See* Mc. Pet. App. 31a (Ginsburg, J., concurring). The only potential police illegality in *Florida Star* was that they had "cause[d] or allow[ed] to be . . . published" the name of a sexual offense victim. 491 U.S. at 536. Thus, as Judge Ginsburg noted in *Boehner*, "the transaction in which the [*Florida Star*] newspaper obtained the name was not illegal *per se*; if the newspaper had not later published the name, the police department would have violated no law." Mc. Pet. App. 31a (Ginsburg, J., concurring). Consequently, it is quite clear, as this Court has already noted, that the newspaper in *Florida Star* had "lawful access to [the] police report" containing the rape victim's name. *Cohen*, 501 U.S. at 671. In short, since *Florida Star* did not present the question of information either illegally obtained or illegally transmitted, it could not

resolve the question of information that is obtained pursuant to such dual illegality, particularly since the opinion emphasized that the rule it was articulating was limited to the "discrete factual context" presented there. 491 U.S. at 530.

Finally, *Florida Star* simply cannot be interpreted as requiring that all disclosure prohibitions, except those applied to defendants who are prohibited from receiving the information, require strict scrutiny. Any such interpretation would bring that case into irreconcilable conflict with the other binding precedent, and laws of unquestioned constitutional validity, discussed above. The defendants in *Harper & Row*, *Zacchini* and *Seattle Times* were not prohibited from receiving or possessing the information at issue, yet the Court, applying at most intermediate scrutiny, uniformly upheld the laws or judicial orders prohibiting the disclosure of such information. As this reflects, Representative McDermott's reading of *Florida Star*, when combined with this Court's other precedent, creates a bizarre and unworkable rule of First Amendment jurisprudence: citizens have a *greater* First Amendment right to disclose information that they possess only through two illegal acts of another than they do to disclose information they have lawfully obtained through court order, as in *Seattle Times*. Under this logic, if the defendant's lawful access to information serves a valuable societal purpose – such as enabling a party to prepare a defense in a lawsuit or to serve as a grand juror – the government may restrict disclosure pursuant to, at most, intermediate scrutiny. But if the defendant has no legal access to the information, and his acquisition of the information is contrary to the concededly important public purpose of preserving the confidentiality of private conversations, then the government is somehow completely disabled from preventing disclosure, absent the most extraordinary circumstances. There is simply no rational basis for such an illogical and destructive regime.

B. The Act Is A Content-Neutral Restriction On Disclosing Other People's Speech.

In any event, even assuming the tapes in these cases were "lawfully obtained" within the meaning of *Florida Star*, there is an additional, independent reason why that opinion and its predecessors would not apply to the Act. *Florida Star* and its predecessors all involved content-based restrictions on particular information precisely because its content was believed harmful, while the Act is a content-neutral prohibition on disclosing others' speech. The laws at issue in *Florida Star* and similar cases prohibited the disclosure of certain information, regardless of how it was obtained, because of its content. The Act, in contrast, prohibits disclosure of certain information, regardless of its content, because of how it was obtained.[7] Thus, the Act's purpose was not to limit the free flow of information "because of disagreement with the message [or information] it conveys," but to facilitate the free flow of information by avoiding the chilling effect that occurs when private communications are intercepted and disclosed. *Hill*, 120 S. Ct. at 2486 (quoting *Ward v. Rock Against*

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[7] The Act applies to any phone call known to be illegally intercepted, regardless of whether that phone call concerns every-day matters or weighty public affairs. Conversely, the Act imposes no restriction unless the source of the information was an illegal interception that the defendant had reason to know about. 18 U.S.C. § 2511(1)(c). Accordingly, for example, *participants* in the phone call are free to discuss its content and Representative McDermott would have been equally free to do so if he had been told of the contents by one of the participants. Thus, under the Act, the defendant "may disseminate the identical information covered by [the Act] so long as the information was gained through means independent of [the illegally-intercepted communication]." *Seattle Times*, 467 U.S. at 34. And, of course, McDermott may more generally offer whatever "facts" or "ideas" he has about ex-Speaker Gingrich's ethics, or any other topic, so long as it is not drawn from the tainted source. *See Harper & Row*, 471 U.S. at 560.

Racism, 491 U.S. 781, 791 (1989)). There is a constitutionally dispositive difference between a prohibition against disclosing certain "private *facts*" because its content is embarrassing and a prohibition against disclosing private *speech* to avoid curtailing such speech. *Florida Star*, 491 U.S. at 534 (emphasis added).

Most obviously, the former prohibition is content-based and the Court has always applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). *See Cohen*, 501 U.S. at 670 ("In [*Florida Star* and *Daily Mail*], the State itself defined the content of publications that would trigger liability."). But where, as here, "the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from [*United States v.*] *O'Brien* [, 391 U.S. 367 (1968)]." *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (citation omitted). *See also Turner*, 512 U.S. at 661 (provisions subject to intermediate scrutiny where they "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny.").

In addition, the Act, unlike the *Florida Star* statute, *furthers* First Amendment interests. While the disclosure of a rape victim's name is a serious invasion of privacy, it does not implicate, or chill, any expressive activity by the victim of the disclosure. Thus, the disclosure restriction can be justified only on the ground that the speaker's First Amendment rights are outweighed by the harm to the victim caused by exposing truthful facts about them. In contrast, the government has an interest in preserving private *conversations* that is wholly distinct from, and in addition to, its "interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 & n.25 (1977). The Court has recognized this distinction by invalidating laws which penalize disclosure of private facts, *see, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967), while upholding laws,

such as copyright statutes and the common law right to publicity, which prohibit unauthorized republication of speech in order to avoid deterring it. In short, the Act's disclosure prohibition does not entail a conflict between privacy and free-flowing discussion, but furthers *both* interests by preserving "the citizens' constitutionally protected right to free private discussion." *Halperin v. Kissinger*, 606 F.2d 1192, 1199 (D.C. Cir. 1979), *aff'd*, 452 U.S. 713 (1981).

Finally, *Florida Star* is inapposite because, as that opinion emphasized at every turn, the key fact there was that the *government* released the confidential information, thus making it publicly available prior to the newspaper's disclosure. *See, e.g., Florida Star*, 491 U.S. at 535, 536, 538. As the Court noted, "where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." *Id.* at 535. It is anomalous because: (1) if the government makes certain information publicly available, it cannot then assert that "a meaningful public interest is served by restricting its further release by other entities, like the press," and (2) "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts" – namely, not releasing it in the first place. *Id.* at 535, 534. If the law authorizes public disclosure of information to certain individuals, or the government gives the information to members of the public, it is almost a *non sequitur* to suggest that the information is "private" or that the government has an interest in keeping it so. But where, as here, the government has done everything it can to keep private information private, there is no diminution in the government's interest in confidentiality and no less restrictive way to prevent disclosure of that information. For this reason, as noted, in cases where the government has *consistently* sought to preserve confidentiality, the Court has uniformly upheld content-neutral restrictions on disclosure. Indeed, *Florida Star* itself confirms the government's power to do so. Where, "sensitive

information rests in private hands," the "government retains *ample* means of safeguarding the significant interests upon which *publication* may impinge," by prohibiting such publication. *Id.* at 534 (emphases added).

Looked at another way, even assuming the tapes in these cases were "lawfully obtained" because, as Representative McDermott argues, Congress refrained from prohibiting receipt of the tapes by defendants, the Act may nonetheless impose a duty of nondisclosure on all those who receive the tapes. Such a duty of nondisclosure would be fully constitutional because, as in *Seattle Times*, the defendant's access to the tape was a "matter of legislative grace," since Congress "granted" access by refraining from penalizing receipt, thus allowing the information to be "lawfully obtained." 467 U.S. at 32.

For all of these reasons, the Act is plainly constitutional because it is a content-neutral disclosure restriction precisely tailored to preventing invasions of privacy and the chilling effect caused by disclosure of private communications.[8]

IV. The Act Plainly Survives Intermediate Scrutiny.

For the reasons stated, the Act is subject, at most, to the intermediate scrutiny framework of *O'Brien* that was applied in *Seattle Times*: "Whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' " and

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[8] An additional reason that *Florida Star* does not control is because the Florida law at issue there, unlike the Act, prohibited disclosure by the media alone. *See Florida Star*, 491 U.S. at 540; 491 U.S. at 542 (Scalia, J., concurring). This both weakened any purported interest in protecting rape victims' privacy and, standing alone, "heightened" the level of "First Amendment scrutiny" because "laws that single out the press . . . for special treatment 'pose a particular danger of abuse by the State.' " *Turner*, 512 U.S. at 640 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times*, 467 U.S. at 32 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). *See O'Brien*, 391 U.S. at 377; *Turner*, 512 U.S. at 662. The Act easily survives such review.

The Act's infringement on defendants' speech is virtually nonexistent, if cognizable at all. Presumably all would agree that no one has any greater First Amendment right to "fence" stolen video tapes or books than one does to "fence" *blank* tapes or paper, even though *authorized* book and tape sellers actions are constitutionally protected. Yet the only difference between such a fence and the defendants in these cases is that the fence's motive is financial, while the defendants here seek political gain (or increased ratings) by embarrassing their opponents. Moreover, the Act imposes *no* limit upon defendants' own speech, but is strictly limited to preventing their *misappropriation* of *others'* speech. Thus, as noted, participants in phone calls can disclose their content, the defendants here could have revealed the content if their source was a participant, and they also could report any information if it was independently acquired. *See supra* p. 20 n.6. Thus, the Act's furtherance of the First Amendment interest in protecting private speech plainly outweighs whatever miniscule effect (if any) it has on defendants' expressive activities.

Yet the Third Circuit found that the Act is not sufficiently tailored to accomplish the concededly significant state interest in "maintain[ing] the confidentiality of wire, electronic, and oral communications." *Bartnicki*, 200 F.3d at 125 (quoting Brief for the United States at 33). The court reached this remarkable conclusion only by wholly mischaracterizing the harm that the Act is designed to prevent and the justification offered in support of it. Specifically, the court found that the Act's prohibition on disclosing purloined phone calls is impermissibly overbroad because the United States could not affirmatively prove that the prohibition would eliminate "the demand for intercepted

materials on the part of third parties." *Id.* Consequently, the First Amendment prohibited the Act's disclosure provisions from being applied to persons other than those who had engaged in the initial interception. This analysis is facially wrong on a number of levels.

First, and most important, the ban on disclosure is entirely valid regardless of whether it leads to less eavesdropping, for it directly serves the distinct purpose of ensuring less *dissemination* of communications that have been intercepted. The harm prevented by the Act is the exposure of one's private conversations to unwanted ears. Interception of the phone call exposes the conversation to one pair of ears, but disclosure exposes it to a potentially limitless number. Thus, disclosure is at least as great an invasion of privacy, and has at least an equivalent chilling effect, as the interception in isolation. While the perusal of one's private diary by an intruder is embarrassing and chilling, a far greater chill and invasion occurs if the diary's contents are disclosed over a mass medium of communication to the public as a whole. Thus, as this Court has noted with respect to a related provision of the Act, "contrary to [the Third Circuit's] assertion that the invasion of privacy is over and done with" when the interception is complete, disclosure of the intercepted call "compounds the statutorily prescribed invasion of their privacy." *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972).

Like the Act's exclusionary rule in Section 2515 and like the Court's exclusionary rule for phone calls intercepted in violation of the Fourth Amendment, the Act's nondisclosure requirement rests on the recognition that disclosure creates a harm separate and distinct from the taping of another's call. Specifically, the Act's purpose is to reinforce the speaker's First Amendment right to choose his audience. Disclosure of speech beyond the speaker's selected audience *further* invades his "right to exclude" and further chills his private speech. The *only* way to prevent such forced expansion of the speaker's audience, and the consequent chilling effect, is to prohibit such dissemination. That being so, the Act's disclosure ban

serves a compelling and important purpose regardless of whether it affects the incentives for the initial interception.

The Third Circuit's fundamental error, then, was its assumption that the disclosure restrictions could only be justified as a disincentive for eavesdropping. If this were true, the government could not separately punish even a thief for disclosing the phone call he has intercepted – he could only be punished for the interception. Obviously, punishing the thief for disclosure cannot discourage the interception he has already committed and, as discussed above, the thief has the same First Amendment right to disclose as the defendants here.

Thus, when the harm that the Act was designed to prevent is properly understood, it is clear that a ban on distribution is not only narrowly tailored, it is, in fact, the "least restrictive alternative." *But see Turner*, 512 U.S. at 662 (restriction on speech "need not be the least speech-restrictive means of advancing the Government's interests."); *Ward*, 491 U.S. at 797. In any event, there is nothing to the Third Circuit's notion that the government can prevent eavesdropping as effectively by prohibiting only the raw act of interception as it can when that prohibition is coupled with a disclosure ban. One might as well say the government can effectively combat child pornography by simply preventing the actual filming of children, without being able to stop the pornographer's distribution (at least by anyone other than the person who did the filming). The Court has already rejected such a facially erroneous assertion. *See New York v. Ferber*, 458 U.S. 747, 760 (1982). Eavesdropping is typically done surreptitiously and, if the disclosure ban can only be applied to the thief himself, it can be easily evaded by "laundering" the tape through another. In the *Boehner* case, for example, Mr. Martin could have taped the phone call and handed the tape to Mrs. Martin who, under the Third Circuit's logic, would have an unfettered right to distribute it to the world.

Finally, particularly since the disclosure prohibition is based on precisely the same obvious linkage underlying all laws prohibiting the receipt or distribution of stolen

goods, or money laundering, as well as the holding in *Ferber*, there was no need for Congress to support its "predictive judgment" with empirical studies establishing that linkage. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). *See Nixon v. Shrink*, 120 S. Ct. 897, 906 (2000). This is particularly true since such specific, empirical proof would be virtually impossible in this context. Such empirical evidence would presumably need to compare the amount of eavesdropping that occurs under laws prohibiting interception alone relative to laws prohibiting both interception and disclosure. But this is not possible since the Act applies everywhere in the United States and has always prohibited both disclosure and interception. Moreover, no one knows how much eavesdropping actually goes on and there were no definitive studies on this question prior to the Act's adoption in 1968 – when, in any event, vastly different technology existed. Thus, the Third Circuit's insistence on "proof" was a fairly transparent effort to facially invalidate any effort to prevent disclosure of illegally-intercepted speech.

The eminently predictable response to the foregoing will be, of course, that the possibility of civil awards for disclosing illegally-intercepted calls will lead to "timidity and self-censorship" by our media guardians and a potential failure to expose "for example, some public officials accepting a bribe" over the phone. *See Bartnicki*, 200 F.3d at 127 (quoting *Florida Star*, 491 U.S. at 535); Mc. Pet. App. 38a (Sentelle, J., dissenting). The short, and complete, answer to these concerns is contained in the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669. *See also Branzburg*, 408 U.S. at 692 (The press has no "freedom to do wrong with impunity" and the right to "state public things and discuss them . . . is subject to the restraints which separate right from wrong-doing.") (citation omitted); *Harper & Row*, 471 U.S. at 557-58. The Act's generally applicable disclosure ban simply denies

the press, and its sources, the ability to exploit the interception of private communications that violate a law of unquestioned constitutional validity. As the *Harper & Row* Court stated in response to a similar argument about press freedom, "[i]n our haste to disseminate the news it should not be forgotten that the Framers intended [protections against outside surveillance of private conversations] to be [an] engine of free expression." 471 U.S. at 558. Freedom of the press does not include any power to trump others' right to free expression by appropriating their speech – copyrighted or private – and presenting it to an unwanted audience.

Fears about a "chilling effect" ring particularly hollow here because the Act contains an explicit *scienter* requirement which immunizes all those without knowledge or reason to know that the communication was illegally intercepted. 18 U.S.C. § 2511(1)(c). This is in stark contrast to *Florida Star*, which involved a strict liability statute and information supplied by the government itself – leading to justifiable concerns that a media outlet naturally relying on government-provided information could unknowingly violate the law. 491 U.S. at 538-39. We note as well that, although the Act has been the unquestioned law for thirty-two years, the media, to say the least, have not been notably more timid during that period in exposing private activities or uncovering public corruption. While it is true that the Act, in an infinitesimal number of cases, may discourage exposure of genuine wrongdoing, the same is true of *every* protection of privacy and private speech – from attorney-client privilege to the Fourth Amendment to the exclusionary rule to the Act's prohibition against *intercepting* private communications. This is the small price we pay for having a private sphere of communication and is what separates us, in a fundamental way, from societies not tolerant of such individual autonomy. Nothing in the First Amendment requires American citizens to surrender this sacred freedom and subject themselves to the Orwellian nightmare of having their most private conversations broadcast over the Nation's airwaves. Indeed, it

would be a perversion of that Amendment to impose such a regime, particularly at a time when new technology (and "evolving" media "ethics") make such intrusions on ever-shrinking private spheres a more concrete reality.[9]

V. The Act, As Applied To Public Officials, Is Constitutional.

Even if all of the foregoing is wrong, the imposition of civil penalties on Representative McDermott would not violate the First Amendment. Unlike the private party respondents, Congressman McDermott, just like the federal judge in *Aguilar*, is a "government official[ ] in [a] sensitive confidential position[ ]" who had access to confidential information as a consequence of that office and took an "oath" to preserve the "confidentiality" of any information so obtained. *Aguilar*, 515 U.S. at 606; Joint Appendix 13, *Boehner v. McDermott*, No. 98-7156 (D.D.C. Apr. 30, 1999) ("Mc. J.A."). Even assuming, then, that "special duties of nondisclosure" may be imposed only on those who voluntarily assume a public trust, this duty may be imposed on Congressman McDermott (or he may be deemed to have "waived" any contrary First Amendment rights) because he is in precisely the same position as the defendant in *Aguilar*.

Aguilar was a federal judge who had learned that a wiretap had been authorized by another judge for the

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[9] Neither *Boehner* nor *Bartnicki* presents a situation where the disclosure at issue was a *republication* of an illegally-intercepted communication that already had been generally made public. We acknowledge that such republication by a newspaper "further down the chain" presents a more difficult case because "the taint of illegality [may be] sufficiently dissipated" and because the government's interest in preserving privacy is diminished, for the reasons reflected in *Florida Star*. Mc. Pet. App. 11a n.7. Such precise line drawing can better be done, however, in an as-applied challenge presenting a concrete factual situation.

telephone of one Abe Chapman, and he informed Chapman of this fact. Under respondents' broad reading of *Florida Star*, Aguilar should have been able to disclose this fact to whomever he pleased, whenever he pleased, totally cloaked in First Amendment immunity. Yet Aguilar was criminally convicted of violating 18 U.S.C. § 2232(c) – the sister provision to the statute (18 U.S.C. § 2511(1)(c)) at issue here – which prohibits disclosure of the fact that a wiretap has been sought or authorized. Aguilar, like Rep. McDermott, challenged the statute, claiming a First Amendment right to disseminate truthful, lawfully obtained information, and the Court unanimously rejected that challenge. *See* 515 U.S. at 606; *id*. at 606-07 (Stevens, J., concurring in part and dissenting in part).

Like Judge Aguilar, Rep. McDermott took an oath of office which precluded disclosure of the relevant information and he has explicitly conceded that he received the tape here only "because of his position as the ranking minority member of the House Committee." Mc. J.A. 138; *see also* Mc. J.A. 151, 159, 160.[10]

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[10] Rep. McDermott swore the following oath as a precondition to his membership on the Ethics Committee: "I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the Committee, except as authorized by the Committee or in accordance with its rules." *See* Rules of the House Committee on Standards of Official Conduct 7; *see also* Rules of the House of Representatives X cl. 4, § 698(e)(4) (same). Likewise, the rules of the House of Representatives and the House Ethics Committee explicitly provide that "[n]o information . . . received . . . shall be publicly disclosed by any Committee or staff member unless specifically authorized in each instance by a vote of the full Committee." Rules of the House of Representatives X cl. 4, § 698(e)(2)(F). *See also* Rules of the House Committee on Standards of Official Conduct 12. Even assuming *arguendo* Representative McDermott's disclosure was not directly governed by the House confidentiality rules, he

In short, if the Court concludes that the Act is unconstitutional as applied to private parties, it should clarify that the Act is constitutional as applied to government officials, where "restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *Aguilar*, 515 U.S. at 606.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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received the tape in circumstances far closer to his official, confidential duties than those involved with Judge Aguilar's receipt of wiretap information. Judge Aguilar was not involved at all in authorizing the wiretap; rather, he was told about it in a private conservation with the judge who was presiding over the matter. 515 U.S. at 596. This did not matter because "special duties of nondisclosure" may *generally* be imposed on government officials, like the ranking member of the House Ethics Committee, in "sensitive confidential *positions*," regardless of whether they have a specific duty of confidentiality concerning the particular information disclosed. *Id.* at 606 (emphasis added).

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Cellular Telecommunications Industry Association ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers.[1] Membership in the association covers all commercial mobile radio service ("CMRS") providers and manufacturers. CTIA represents more broadband Personal Communications Service carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the matter before the Court.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit's decision[3] undermines Congress's carefully constructed statutory scheme to secure the privacy of the contents of wireless communications. Ensuring wireless subscriber privacy furthers Congress's dual interests in developing the growth of wireless telecommunications and preserving wireless subscribers' First Amendment rights to speak freely, without fear of interception. Congress has determined that these interests outweigh any First Amendment rights the media and other individuals may have to "speak" through expressive conduct by revealing the contents of illegally intercepted communications.

Wireless service use has expanded exponentially in recent years. There are over 100 million wireless subscribers in the

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members made any monetary contribution to the preparation or submission of this brief.

[2] CTIA has obtained consent from all Petitioners and Respondents to file this brief.

[3] *Bartnicki v. Vopper*, 200 F.3d 109 (3rd Cir. 1999).

United States today, and each day, that number grows by another 67,082 new subscribers. Since 1993, the number of wireless customers has increased by 90 million customers. Nearly 14 million of those customers have subscribed to wireless service in just the last six months.[4]

Subscribers of wireless service use their service for both business and personal purposes. Employees use wireless telephones to conduct business while commuting or traveling. Individuals use wireless telephones to keep in touch with family and friends. There is also a growing trend to replace traditional wireline telephones, both at home and in the office, with wireless telephones. Experts in the wireless industry expect that the number of current wireless subscribers will double within the next two years.[5]

The wireless industry has invested approximately $58 billion to deploy facilities and services since 1993.[6] Today, wireless competition flourishes. More than 241 million Americans can choose from between three and eight wireless service providers. More than 178 million Americans can choose from among five or more wireless providers. Over 81 million Americans can choose from among six or more wireless providers.[7] However, the industry's investments will be compromised without suitable protections for the privacy of subscriber communications. Subscribers to wireless services have a legitimate expectation of privacy in their communications, and will not speak freely if their

[4] "The History of Wireless," <www.wow-com.com/consumer/faqs/faq_history.cfm>.

[5] *Id.*

[6] "Annualized Wireless Industry Data Survey Results," <www.wow-com.com/statsurv/survey/199912b.cfm>.

[7] "The History of Wireless," <www.wow-com.com/consumer/faqs/faq_history.cfm>.

expectations are not met. Recognizing the threat to subscribers' First Amendment rights and the wireless industry, Congress carefully tailored statutory protection for privacy in wireless communications.

The Third Circuit's decision invalidating the protections of the Electronic Communications Privacy Act of 1986 ("ECPA")[8] against disclosure of illegally intercepted communications, if allowed to stand, will have significant and far-reaching repercussions beyond the issues involved in this case. The decision will nullify a large number of state laws providing similar protection. More generally, such a decision could ultimately restrict the application of numerous other laws restricting the disclosure of information, such as those preserving the confidentiality of the names of rape victims or juvenile offenders, as long as the disclosing party has not participated in the illegal interception or theft of that information.

Congress has determined that in order to preserve certain values of American society—protecting the confidentiality of private conversations, the names of young wrongdoers and the identity of innocent victims of crime—any rights of the public to "speak" by disclosing certain private or sensitive information must be curtailed. This restriction applies with even greater justification where that information was obtained through unlawful means. ECPA was carefully crafted to address the specific problems Congress identified, without unnecessarily restricting any additional "speech." The Third Circuit's decision upsets this balance. CTIA submits this brief in support of Petitioners' argument that the Third Circuit's decision in this matter must be reversed.

[8] 18 U.S.C. §§ 2510 *et seq.*

ARGUMENT

I. ENSURING THE PRIVACY OF SUBSCRIBER COMMUNICATIONS FURTHERS THE FEDERAL POLICIES OF ALLOWING WIRELESS CUSTOMERS TO EXERCISE THEIR RIGHT TO SPEAK FREELY AND ENCOURAGING THE GROWTH OF THE WIRELESS INDUSTRY

Congress repeatedly has recognized that preserving subscribers' expectation of private communications is essential to its dual goals of protecting the First Amendment rights of wireless subscribers and promoting the growth and development of the wireless industry. Through Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by ECPA, and the Communications Act of 1934 (the "Communications Act"), Congress has given express privacy protection to communication over wireless telephones and has established remedies for invasions of these communications. These provisions represent a congressional mandate to secure subscriber privacy. The Third Circuit's decision undermines wireless subscriber privacy rights. It also contradicts Congress's determination that the preservation of subscriber privacy is vital to wireless subscribers' First Amendment right to speak and, in turn, to the growth and development of the wireless service industry.

A. There is a Strong Federal Policy of Protecting Wireless Subscribers' Rights as First Amendment Speakers.

Americans have a significant societal and financial interest in maintaining the privacy of communications, and legitimately expect that their communications, including

wireless communications, are private.[9] They expect that their communications will not be unlawfully intercepted, and that the contents of their communications will not be unlawfully disclosed or used. A loss of the expectation of privacy in effect nullifies wireless subscribers' First Amendment right to speak.

Congress recognized that a loss of privacy would restrict the speech of wireless subscribers, and took a number of legislative steps to ensure subscriber privacy. Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (amended by ECPA) to "protect[] the privacy of wire and oral communications" and "delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[10] In 1986, when the cellular telecommunications industry was in its infancy, Congress amended the prior definition of protected "wire communication" specifically to include cellular communications.[11] Thus, ECPA protects communications, including wireless communications, from

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[9] Although the Petitioners in this matter may be considered public figures who were discussing matters that may be of public concern, their public stature and the public nature of their conversation does not obliterate the protection of privacy afforded them in their communications. Notably, had there been no illegal interception of their communication, Respondents would not have known about the communication, whether it was between public figures or private individuals, and whether its nature was of public concern or a private interest.

Even if this Court finds that Petitioners' communication was not protected from disclosure and use because the Petitioners were public figures discussing a matter of public concern, this Court should find that communications between private individuals regarding private or public matters are protected from unlawful interception, disclosure, and use.

[10] S. Rep. No. 90-1097, 90th Cong., 2d Sess., 66 (1968).

[11] *See* S. Rep. No. 99-541, 99th Cong., 2d Sess., 6 (1986).

unlawful interception, and from the unlawful disclosure and use of information obtained from such unlawful interceptions.

The legislative history of ECPA confirms that ECPA was designed to "protect the privacy of our citizens" so that potential customers would not be "discourage[d] . . . from using innovative communications systems."[12] This Court also has recognized that in enacting ECPA, "the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). Similarly, in *United States v. Cianfrani*, the court noted that:

> protection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. . . . Only by governing strictly both authorization and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.

573 F.2d 835, 856 (3rd Cir. 1978).

Section 302(d) of the Communications Act confirms the overriding importance that Congress has placed on privacy in wireless communications. Section 302(d) directs the Federal Communications Commission ("FCC") to deny equipment authorization to any scanning receiver that is capable of receiving transmissions in the frequencies allotted to wireless service, or may be readily altered to receive such transmissions, and prohibits the manufacture or import of such receivers. 47 U.S.C. § 302a(d). Further, Congress also has taken steps to increase subscriber confidence in the confidentiality of wireless communications by making it a crime to engage in a broad array of activities related to the

[12] *Id.* at 5.

theft of wireless service,[13] and to engage in the manufacture, distribution, possession, or advertising of interception devices.[14]

B. There is a Strong Federal Policy of Encouraging the Growth and Development of the Wireless Service Industry.

The privacy protections described above are a critical element of the statutory framework to encourage the growth in wireless services. If persons do not expect that their wireless communications will be kept private, they will not be willing to subscribe to wireless service. Such a result contradicts the explicit Federal policy of encouraging the use of wireless service.

The Communications Act includes several provisions to facilitate and encourage the growth of the wireless service industry. Section 1 of the Communications Act, for instance, establishes the national policy of "mak[ing] available . . . a rapid, efficient, Nation-wide, and world-wide . . . radio communication service . . . ." 47 U.S.C. § 151. Likewise, section 309(j) of the Communications Act establishes a competitive

[13] For instance, 18 U.S.C. § 1029 imposes fines, imprisonment ranging from 10 to 20 years, or both, on a person who "knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services" (§ 1029(a)(7)); "knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a scanning receiver" (§ 1029(a)(8)); or "knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization" (§ 1029(a)(9)).

[14] 18 U.S.C. § 2512.

bidding procedure to promote the rapid and efficient assignment of wireless spectrum. 47 U.S.C. § 309(j).

More specifically, in 1993, Congress established a national regulatory framework for CMRS that preempted state and local rate and entry regulation and authorized the deregulation of these services at the Federal level.[15] Through the enactment of section 332(c), Congress sought to promote investment in wireless services. *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd 1411, 1421 (1994).[16] The legislative history of section 332 clarifies Congress's understanding that a uniform national policy is necessary to promote competition in the wireless marketplace and further the Federal policy to encourage further investment in wireless infrastructure. *See* H.R. Rep. No. 103-213, 103d Cong., 1st Sess., 480-81 (1993), H.R. Rep. No. 103-111, 103d Cong., 1st Sess., 260 (1993).

The protection of subscriber privacy that Congress established in ECPA is crucial to Congress's overall goal of promoting the use of wireless communications and the success of the industry. As Congress recognized, allowing persons to disclose intercepted communications may discourage consumers from using those services, and "may

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[15] *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, 6002(b), 107 Stat. 312, 392-393 (codified in scattered sections of 47 U.S.C.).

[16] More generally, section 332 also requires the FCC to manage the spectrum in such a way as to "improve the efficiency of spectrum use and reduce the burden upon spectrum users" and "encourage competition and provide services to the largest number of feasible users." 47 U.S.C. §§ 332(a)(2), (3).

discourage American businesses from developing new innovative forms of telecommunication."[17]

II. RESPONDENTS HAVE NO FIRST AMENDMENT RIGHT TO DISCLOSE ILLEGALLY INTERCEPTED COMMUNICATIONS

Respondents have no First Amendment right to disclose private wireless communications. Disclosing and using illegally intercepted communications is not expressive conduct protected by the First Amendment. Even if it were protected conduct, under the *O'Brien* test,[18] Respondents' First Amendment rights would be outweighed by wireless subscribers' right to privacy ensured by ECPA.

A. The Acts of Disclosing and Using Illegally Intercepted Communications Are Not Expressive Conduct Protected by the First Amendment.

Only "expressive" conduct—conduct that rises to the level of being "communicative and that, in context, would reasonably be understood by the viewer to be communicative"—may be accorded First Amendment protection. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *see also Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Disclosing and using illegally intercepted communications is not expressive conduct, and does not merit First Amendment protection.[19]

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[17] S. Rep. No. 99-541, *supra*, n.11, at 5.

[18] *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[19] Similarly, not all speech is protected by the First Amendment. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 49, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). For example, there is no First Amendment protec-

This Court has found conduct to be "expressive" where it is inexorably tied to expression of ideas or beliefs. In *Clark*, for example, persons sought permission to camp in Lafayette Park to call attention to the plight of the homeless. In *Johnson*, a person burned the American flag to protest the re-nomination of President Reagan. In contrast, Respondents' disclosure of unlawfully obtained conversations is not an attempt to express a particular viewpoint. Their act of disclosing information does not sufficiently possess the communicative elements that were found in *Johnson* to implicate the First Amendment. *See Johnson*, 491 U.S. at 404-406. As such, Respondents' conduct is not protected by the First Amendment.

In fact, ECPA was enacted to prohibit the very sort of conduct in which Respondents engaged. ECPA does not limit to whom its prohibitions apply. Neither any individual nor the media is exempt from these prohibitions. As this Court has recognized, the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Nor is the First Amendment a "license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). "Although stealing documents or private wiretapping could provide newsworthy information, neither

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tion for publication of libelous statements (*see New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)); for advocating use of force or violation of law to incite or produce imminent lawlessness (*see Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)); or for appropriation of an author's copyrightable expressions (*see Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)).

reporter nor source is immune from conviction for such conduct . . . ." *Branzburg*, 408 U.S. at 691.[20]

B. Even if Respondents' Acts of Disclosing and Using Illegally Intercepted Communications Are Expressive Conduct, Their Right to Engage in Such Conduct Is Outweighed by the Government's Substantial Interest in Protecting Privacy in Wireless Communications.

Even if Respondents' actions are deemed expressive conduct, their First Amendment right to disclose information is outweighed by the Government's substantial interest in protecting the privacy of wireless communications. Expressive conduct protected by the First Amendment "may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark*, 468 U.S. at 294 (citing *O'Brien*). Courts have often tempered First Amendment rights in this manner. In *Clark*, for example, the Court found that the statute restricting individuals from sleeping in the park served the substantial governmental interest of maintaining the park in an attractive and intact condition, and thus justified limitations on First Amendment freedoms. The Government has such a similarly substantial interest in protecting the privacy of wireless communications.

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[20] While the Court on one occasion permitted newspapers to publish stolen, confidential documents (*i.e.*, the Pentagon Papers), *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), it did so because it found that the Government did not meet its burden of showing justification for the imposition of a prior restraint on expression.

1. *The Government Has A Substantial Interest in Protecting the Privacy of Wireless Communications.*

There is a substantial governmental interest in protecting the privacy of wireless communications. As described fully above, ECPA's prohibitions on illegal interception, disclosure, and use of private communications are part of a continuing congressional effort to preserve wireless subscribers' right to speak freely, and to promote investment in and development of wireless technology and infrastructure by encouraging consumer confidence in the service, the network, and the privacy of wireless communications.

For these reasons, the court below and other courts considering the question have agreed that there is a substantial governmental interest in protecting privacy in communications. *Bartnicki*, 200 F.3d at 122; *Peavy v. WFAA-TV, Inc.*, 2000 WL 1051909 (5th Cir. 2000), *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999).[21]

2. *ECPA's Prohibitions on Expressive Conduct Are Narrowly Drawn.*

Statutory prohibitions on speech or expressive conduct comport with the First Amendment if the burdens on the prohibited speech are necessary and narrowly tailored to achieve the Government's interest. *O'Brien*, 391 U.S. at 377.

[21] In the search-and-seizure context, moreover, this Court and Congress have recognized a constitutional right to privacy of telephone conversations, whether wireline or wireless. *See Katz v. United States*, 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (telephone conversations intended by the speakers to be private are private; "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication"); *see also* S. Rep. No. 99-541 at 2 (citing *Katz*).

ECPA's prohibition on certain expressive speech meets this standard.

First, ECPA's burdens on speech are necessary in order to protect the privacy of wireless communications and the First Amendment rights of wireless users to speak freely without fear of being intercepted. The *Boehner* and *Peavy* courts specifically recognized the suppressing effect on free speech that results from lack of privacy. *See Boehner*, 191 F.3d at 468 ("[e]avesdroppers destroy the privacy of conversations. The greater the threat of intrusion, the greater the inhibition on candid exchanges. Interception itself is damaging enough. But the damage to free speech is all the more severe when illegally intercepted communications may be distributed with impunity."); *Peavy*, 2000 WL 1051909 at 36 (the "protection of communications' confidentiality encourages, rather than suppresses, free expression."). As the *Boehner* and *Peavy* decisions recognize, parties to a communication will no longer speak freely if they fear their communications can be unlawfully intercepted, disclosed, and used without recourse.

If this Court affirms the Third Circuit's ruling, persons whose privacy has been invaded through illegal interception, disclosure, and use of their communications will have no recourse for the damages they have suffered, because the identity of the person who unlawfully intercepts the communication is often never known.[22] As Judge Pollak noted below in his dissent, "[o]ne would not expect [the unlawful eavesdropper] to reveal publicly the contents of the communication; if [he] did so [he] would risk incriminating

[22] While the media outlet may know the identity of the interceptor, state shield laws will prevent disclosure of the interceptor's identity. Further, as discussed above, affirming the Third Circuit's holding will likely nullify most, if not all, of the state statutes, including Pennsylvania's statute, that regulate electronic surveillance and the disclosure of private communications obtained through such surveillance.

[himself]." *Bartnicki*, 200 F.3d at 133 (quoting *Boehner*, 191 F.3d at 470). Likewise, in *Boehner*, the court explained that interceptors " 'can literally launder illegally intercepted information' and there would be 'almost no force to deter exposure of any intercepted secret.'" *Id.* at 470 (quoting *Boehner v. McDermott*, 1998 WL 436897, *4 (D.D.C. July 28, 1998)).[23] It is for this very reason that Congress imposed liability on individuals who knowingly disclose or use illegally intercepted communications. Congress's goals cannot be achieved without a corresponding burden on the media or other individuals' speech or expressive conduct.

Second, ECPA's burdens on speech are narrowly tailored to address the Government's interests. The Third Circuit erroneously held that there was no evidence that ECPA furthers the Government's interest in promoting privacy, that the connection between preventing third parties from using or disclosing intercepted material and preventing the initial interception was "indirect at best," and that the court was "not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect." *Bartnicki*, 200 F.3d at 125-26. However, it is patently obvious that if individuals and the media cannot disclose or use a communication that they know, or have reason to know, has been obtained through an illegally intercepted communication, the demand for such communications will be largely eliminated, thus deterring would-be interceptors. The Third Circuit's demand that the United States offer concrete evidence that ECPA's prohibition has "deterred any other would-be interceptors" sets an unattainable standard. The deterrent effect of the statute is proved by the fewer number of unlawful eavesdropping cases and the less frequent need

[23] Even where the identity of the interceptor is known, as it was in *Boehner*, meaningful recourse is often impossible once the private speech has been publicly disclosed.

for enforcement activity under ECPA, neither of which is capable of being presented as evidence. Under the Third Circuit's interpretation of narrow tailoring, the balance of harms would weigh in favor of disclosure in each instance. Such a result is not compatible with the standard set forth by this Court in *O'Brien*.

The other courts that have balanced ECPA and First Amendment considerations have found more than a sufficient nexus between the problem and solution. For instance, the *Peavy* court found that:

> [p]rohibiting interception alone is not sufficient to protect the privacy of communications. Without the use and disclosure proscriptions, government's efforts to prohibit interception would be far less effective, because a person who illegally intercepts a conversation and wishes to disclose it to the public can do so, at no risk to himself, by simply anonymously providing the contents of the communication—by use of a tape or otherwise—to third parties, such as the media, who have an interest in disclosing, or otherwise using, those contents (as in Bartnicki).

2000 WL 1059109 at 36.[24]

The *Boehner* court also recognized the connection between the activities prohibited by ECPA and the statute's desired result:

> [u]less disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is

[24] The *Peavy* court distinguishes its holding (and that in *Boehner*) from the Third Circuit's decision below on the basis that in *Peavy* and *Boehner*, there were allegations that the defendants had participated in the illegal interception. However, the holdings of *Peavy* and *Boehner* apply with equal force here, because liability for unauthorized disclosure and use under ECPA does not depend on participation in the underlying illegal interception.

> prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of non-disclosure.

191 F.3d at 470.

As the dissent below persuasively argued, ECPA is narrowly tailored to achieve the substantial governmental interest in protecting the privacy of wireless communications. This Court should similarly find that the Government's interest in protecting the privacy of wireless communications is narrowly tailored.

C. The Cases Cited by Respondents As Support for the Argument that the First Amendment Bars ECPA's Prohibitions On Expressive Conduct Are Inapposite.

Respondents rely principally upon four cases for the proposition that the First Amendment protects lawfully obtained information and prohibits criminal sanctions for the publication of truthful information. Although all four cases address the conflict between First Amendment rights and personal privacy, as protected by various state statutes, these cases are factually inapposite to the matter before the Court. This case involves the imposition of civil sanctions for the intentional disclosure and use of a private communication that the parties to the communication had not made public and that the Respondents knew, or had reason to know, was unlawfully obtained. Far from deciding the case at bar, the cases relied upon by Respondents specifically reserved the question of whether prohibition of disclosure or use of

unlawfully obtained information would violate the First Amendment.

First, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) is of no avail to Respondents because the Court specifically found in *Cox* that the information disclosed was not private. The Court held that a rape victim's privacy had faded, even though her name was published in violation of a Georgia statute, because the reporter lawfully learned the name of the victim from records made available for public inspection. Accordingly, the First Amendment barred the State from imposing any sanctions on the newspaper for publication after disclosure. In contrast, in this case, the information disclosed was a private communication that neither party to the communication made public. More specifically, the communication here was unlawfully intercepted, disclosed, and used.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) is similarly unavailing. There, the Court held that criminal sanctions could not be imposed on a newspaper for unlawfully divulging lawfully obtained, truthful information regarding certain confidential proceedings because the State's interests in protecting such confidentiality did not sufficiently justify the infringement on First Amendment rights. In this case, however, the remedy being sought is civil, not criminal; the subject of the civil suit is an unlawful disclosure of information that was unlawfully obtained from a private communication; and the Government's interest in protecting privacy in communications, accomplished by ECPA's prohibitions, justifies the limitations on the Respondents' First Amendment rights, as elaborated previously.

Respondents' reliance on *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) is also baseless. In *Daily Mail*, the Court held that there was no expectation of privacy, and criminal sanctions could not be

imposed when newspapers published, in violation of a West Virginia statute, the name of a juvenile offender that they lawfully obtained from witnesses, the police, and a prosecutor. In this case, the disclosure concerned unlawfully obtained information. Further, the parties to the communication at issue here had a reasonable expectation of privacy that did not fade when their communication was illegally intercepted, disclosed, and used.

Finally, *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) does not support Respondents' arguments. In *Florida Star*, the Court held that a statute prohibiting a newspaper from publishing the name of a victim it had obtained from a publicly released police report violated the First Amendment. But unlike the information published in *Florida Star*, the communication disclosed and used in this case was not lawfully obtained. Rather, it was obtained through an illegal interception of a private communication. *Florida Star* did not decide the question presented by this case: "whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8.

Contrary to Respondents' suggestion, the protected status of otherwise public information provides no support for an asserted right to publish information that has been unlawfully obtained or intercepted. This Court should affirm its past precedent of allowing disclosure of private information only when such information has been lawfully obtained, and hold that unlawfully obtained, non-public information protected by statute must be kept confidential. If individuals and the media can disclose the fruits of unlawful interception with impunity, the privacy of this confidential information—whether the contents of a confidential wireless communication, the name of a juror, or the identify of a rape victim—will be fatally compromised, and those whose

privacy has been violated will be left without an effective remedy. The right to publish must be tempered by this right to privacy. Likewise, the right of citizens to communicate freely with one another is strengthened by precluding the disclosure of unlawfully intercepted conversations.

CONCLUSION

For the above reasons, the decision of the Third Circuit allowing the media to disclose the contents of unlawfully intercepted, private wireless communications should be reversed.

Respectfully submitted,

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Petitioners,

v.

FREDERICK W. VOPPER, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICUS CURIAE* OF DOW JONES & COMPANY, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Dow Jones & Company, Inc., submits this brief *amicus curiae* in support of respondents. Dow Jones publishes *The Wall Street Journal*, a daily newspaper with a national circulation of approximately 1.8 million each business day, *WSJ.com*, a news website with over 500,000 paid subscribers, *Dow Jones Newswires*, a collection of real-time electronic news services, and other business-news publications, including *Barron's* and *Smart Money* magazines.[1] As such, its interest in this case is direct, immediate and on-going. The fundamental issues presented by this case—whether and under what circumstances the government may punish the publication of truthful, lawfully obtained information about a matter of public concern—arise most frequently in cases involving the press. Such cases often arise in the context of the statute involved here, the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 28 U.S.C. § 2510, *et seq*. *See, e.g.*, *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000); *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. filed*; 99-1709, 68 U.S.L.W. 3868 (Apr. 25, 2000); *Keller v. Aymond*, 722 So. 2d 1224 (La. App. 3d Cir., 1998), *writs denied*, 742 So. 2d 551, 552 (La.), *cert. denied sub nom Central Newspapers, Inc. v. Johnson*, 120 S. Ct. 397 (1999); *Mayes v. Lin Television of Texas, Inc.*, 1998 WL 665088 (N.D. Tex. Sep. 22, 1998).

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the parties did not author this brief in whole or in part. No person or entity, other than Dow Jones, made a monetary contribution to the preparation and submission of this brief.

Like most news organizations, Dow Jones frequently obtains by lawful means highly newsworthy information that may have been obtained or disseminated improperly by the source of that information or another party. *See, e.g.*, Rachel Zimmerman, "Choice Allies: Awaiting Green Light, Abortion-Pill Venture Keeps to Shadows," WALL ST. J., Sept. 5, 2000, at A1 (discussing secrecy surrounding one company's efforts to market RU-486, the so-called abortion pill, and detailing, based on "internal [company] documents reviewed by *The Wall Street Journal*," the plans of the company to manufacture, market and distribute RU-486, "one of the most controversial drugs ever to hit the U.S. market," once FDA approval was obtained). The rule advocated by petitioners would, if adopted by this Court, jeopardize newsgathering and encourage an increasing variety of government efforts to punish publication by the press of lawfully obtained, newsworthy, and truthful information.

SUMMARY OF ARGUMENT

This case is not, as the government and petitioners would have it, about "the receipt and sale of stolen property," U.S. Br. at 40, the "distribution of child pornography," Pet. Br. at 38 n.18, or the relationship between a "thief" and a "fence." Boehner Amicus Br. at 8. It is about truthful speech by the press concerning matters of public interest based on information lawfully obtained. The analogies in the parade of horribles offered by petitioners and their *amici* simply do not come to grips with the basic and unavoidable fact that the First Amendment specifically singles out for protection truthful speech about important public subjects because such protection is essential to democracy. Nor do petitioners correctly understand the notion of "privacy" as it relates to the dissemination of information in a free society.

1. Government-imposed sanctions, such as statutory and punitive damages or criminal penalties, for informing the public of lawfully obtained truthful information of concern to the public, absent a compelling governmental need, would disrupt the sensitive balance required by the Constitution.

The First Amendment establishes a balance in an "unruly contest" between the press, which seeks out and disseminates newsworthy information to the public, and the government, which sometimes seeks to protect the secrecy of newsworthy information. Alexander Bickel, *Domesticated Civil Disobedience: The First Amendment, from Sullivan to The Pentagon Papers*, THE MORALITY OF CONSENT 57 (1975). A fundamental assumption underlying this theory of the First Amendment is that the government may attempt to maintain the secrecy of information, but once that information is lawfully obtained, the press may publish it without fear of reprisal from the government absent the most extraordinary and compelling circumstances.

This precept is fundamentally different from those aimed at thwarting content-based regulation: It is a fundamental structural rule of our governmental system that is analogous to the bedrock ban on prior restraints. Government intervention to enforce the secrecy of newsworthy information lawfully obtained by the press must be treated as comparably suspect, a subject of the most intense judicial review.

To accept only "intermediate scrutiny" of such intervention, as petitioners and the government urge, would fatally undermine the very premise of the constitutional structure erected by the Framers. Rather than concerning itself with the lawfulness of its own conduct, and the accuracy and newsworthiness of information in its possession, the press necessarily would be forced to affirmatively aid government, business, public officials, and public figures in maintaining their secrets. The press would be required to investigate the conduct of its own sources and, upon concluding that a source might well have breached some law or duty in obtaining truthful information of significant public importance, somehow erase this data from its memory. Thus, the intermediate scrutiny test proposed by petitioners would inject intolerable uncertainty into decisions whether to publish—and perhaps even to investigate further—newsworthy information. This would be a dramatic

departure from existing law and the way the press is permitted, and indeed, expected to act. Obtaining and publishing information from sources who themselves are breaching a legal duty in providing the information to the press, are "paradigmatically 'routine newspaper reporting techniqu[es].'" *The Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (citation omitted). To authorize punishment of this traditional journalistic activity absent some compelling governmental need of "the highest order" would invite precisely the sort of timidity and media self-censorship that the First Amendment exists to prevent.

2. The law of privacy in the United States has, since its inception, respected this basic First Amendment limitation. In the context of a private suit for damages against the press, publication of truthful information of "public concern" does not implicate any legally cognizable privacy interest that overrides the First Amendment's protections. This "public concern" rule was endorsed by Warren and Brandeis in their 1890 article first formulating a privacy tort (Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)), and then uniformly adopted as a matter of common law throughout the Nation. This Court has looked to and incorporated this common-law principle into its First Amendment jurisprudence, and it plainly bars Ms. Bartnicki's and Mr. Kane's claims.

ARGUMENT

There is a constant and inevitable tension between an individual's desire for privacy and the rights of free speech and free press guaranteed by the First Amendment. *Florida Star*, 491 U.S. at 530. "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). As this Court recognized many years ago: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. [That risk] is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Id.*

This Court has repeatedly addressed the "collision between claims of privacy and those of a free press," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). And in each instance, without fail, the Court has applied the First Amendment to strike down efforts to punish publication, holding that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (report of juvenile court proceedings revealing identity of juvenile murder suspect); *see also, e.g., Cox Broadcasting*, 420 U.S. 469 (report of judicial proceeding revealing identity of rape-murder victim); *Florida Star*, 491 U.S. 524 (report of criminal proceedings revealing identity of rape victim); *Butterworth v. Smith*, 494 U.S. 624 (1990) (disclosure of witness's own grand jury testimony concerning alleged improprieties in the state's attorney's office and sheriff's department).

The facts here call for straightforward application of the *Daily Mail* test. There is no dispute that the contents of the taped telephone call anonymously provided by Mr. Yocum to the radio stations accurately reflected information that was of public concern and significance. The tape revealed a

discussion between Ms. Bartnicki, a chief negotiator for the public teachers' union, and Mr. Kane, the local union president, about a divisive local political issue, teacher pay increases, and included inflammatory and seemingly threatening (even if meant only "rhetorically," Pet. Br. at 5) statements by Mr. Kane regarding school board members. Ms. Bartnicki and Mr. Kane are no longer seeking compensatory damages for *any* actual injury as a result of the disclosure of the tape. The broadcast portion of the tape itself involves discussions of union business, not the sort of "very private matters unrelated to public affairs" that this Court has previously suggested might theoretically, in some extreme and as yet unrealized circumstance, trump the First Amendment interest in dissemination of truthful information about public issues. *Cox Broadcasting*, 420 U.S. at 491. And it is undisputed that the radio stations, Mr. Yocum and the announcers did not participate in the illegal interception of the telephone call, which was "intercepted and recorded by an unknown person." *Bartnicki v. Vopper*, 200 F.3d 109, 113 (3d Cir. 1999), *cert. granted*, 99-1728, 68 U.S.L.W. 3789 (June 26, 2000).

Despite these facts, petitioners argue that this Court should cast aside the *Daily Mail* test and adopt instead an exceedingly elastic version of the "intermediate scrutiny" test. Essentially, petitioners ask the Court to allow Title III to be used as the basis for a statutory "privacy" tort that could be labeled "public disclosure of newsworthy public facts." But such a cause of action would be flatly contrary to (1) the basic structural underpinnings of the relationship between the government and the press as enshrined in the First Amendment; and (2) the "public concern" exception recognized by common-law privacy doctrine and mirrored in this Court's First Amendment cases.

I. The Constitutional Balance Between Freedom Of The Press And Government-Enforced Confidentiality Precludes Punishing Truthful Speech On Matters Of Public Concern Absent A Government Need Of The Highest Order

This Court's decisions in cases such as *Daily Mail*, *Florida Star*, and *Cox Broadcasting* reflect a clear limitation that the First Amendment places on the means the government may use to enforce the confidentiality of private or government communications and information. This overarching rule provides that, although the government may attempt to prevent unauthorized dissemination of confidential information, once truthful information regarding matters of public concern is lawfully obtained by the press, the press ordinarily cannot be penalized for publishing it. The press cannot be punished even though the government and the speakers involved wish, and otherwise would have been entitled, to keep the information away from the public.[2]

Professor Alexander Bickel referred metaphorically to this battle between the press and the government as an "unruly contest" that is integral to our democracy. Alexander Bickel, *Domesticated Civil Disobedience: The First Amendment,*

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[2] Like most states, Pennsylvania has a myriad of doctrines and laws—analogous to Title III—designed to preserve privacy and secrets. *See, e.g., A.M. Skier Agency, Inc. v. Gold*, 747 A.2d 936, 939 (Pa. Super. Ct. 2000) (describing the elements of a claim for misappropriation of trade secrets); *McGuire v. Shubert*, 722 A.2d 1087, 1092 (Pa. Super. Ct. 1998) (setting forth elements of claim for intrusion into seclusion); *Larsen v. Philadelphia Newspapers, Inc.*, 543 A.2d 1181, 1189 (Pa. Super. Ct. 1988) (publication of private facts). These doctrines and laws, however, have traditionally *not* been used to punish the press for publishing information it lawfully obtained from a source, even if that source may have originally obtained it unlawfully.

from Sullivan to The Pentagon Papers, THE MORALITY OF CONSENT 57, 82 (1975) (treated as authoritative by this Court in the related area of injunctions against publication, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 n.6 (1976)). Under the "rules" of this contest,

> [t]he government is entitled to keep things private and will attain as much privacy as it can get away with politically by guarding its privacy internally; but with few exceptions involving the highest probability of very grave consequences, it may not do so effectively. It is severely limited as to means, being restricted, by and large, to enforcing security at the source.

Id. at 79-80. The balance undoubtedly leads to frustrations on both sides. But there is no alternative consistent with constitutional values:

> It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable.

Id. at 80. The relationship between the press—by which Professor Bickel meant "anybody, not only the institutionalized print and electronic press" (*Id.* at 80)—and the government may thus be analogized to an "adversarial game" comparable to "the collision between prosecutor and defense in our system . . . of criminal justice." *Id.* at 81-82. Professor Bickel further observed:

> [A]s I conceive the contest established by the First Amendment, and as the Supreme Court of the United States appeared to conceive it in the Pentagon Papers case, the presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources. Those responsibilities rest chiefly elsewhere. Within self-disciplined limits and presumptively, the press is a morally neutral, even an unconcerned, agent as regards the provenance of newsworthy material that comes to hand; and within

> like limits and again presumptively, the press is not the judge or the definer of the national interest.

Id. at 81.

As articulated by Professor Bickel, the government may attempt to protect the secrecy of information. But the government has a monopoly on force, and unless restricted by the First Amendment, the government could use that force to *demand* that it prevail whenever tension arose between secrecy and disclosure. Without the balance of the First Amendment, and its insistence that disclosure be the prevailing interest absent powerful government reasons to the contrary, only government-authorized information would be disseminated to the public.

In the context of information of public concern, then, the press may publish what it learns, but its ability to obtain information is not unlimited. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986). Certainly, the government may seek to control invasions of privacy in communications, or seek to control the flow of sensitive information to third parties and the press.[3] But once truthful information of public concern is lawfully obtained by the press, no court may use its powers to restrain the press from publishing it, except perhaps in the most extreme and compelling circumstances, as explained by this Court's decision in the *Pentagon Papers* case and other prior restraint cases. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

To be sure, this case presents the contest between the press and the government in a different context than that

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[3] For example, courts may, under appropriate circumstances, order documents and other discovery material to be kept under seal, even by members of the press. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

presented in the *Pentagon Papers* case. The information given to WILK and WGBI did not come from the government, and the government is not trying to restrain publication in advance, but rather to punish publication after the fact to achieve the goal of protecting individual privacy. But government has exerted its authority by enacting Title III, which identifies a particular type of information as subject to statutory confidentiality, and has authorized the courts to sanction disclosure and use of such information. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has been in fact exercised."). And it is to the government that Mr. Bartnicki and Mr. Kane have turned to punish the press for publishing to the public a conversation they claim was private, asking the district court to force the press to pay damages. Thus, the government has very much entered fray and has actively participated in altering the balance between secrecy and public disclosure of newsworthy information.

This Court in its *Daily Mail* line of cases and in other circumstances has been exceedingly careful to protect the press from such sanctions where the press breaks no law in obtaining the information, making clear that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without . . . fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *see also* Bickel, *supra*, at 67 ("It is unlikely to be held that the First Amendment allows the *in terrorem* effect of criminal prosecution to take away everything that protection against prior restraints is intended to give, and even in some circumstances more.").

The intermediate scrutiny test suggested by petitioners would dramatically alter the balance ordained by the Constitution and impermissibly chill the publication of newsworthy speech. Indeed, it would give the government the power, in the name of privacy or some other "important or substantial" governmental interest, Pet. Br. at 14-15, to

reverse the presumption in favor of publication and literally make the press' ability to publish newsworthy information depend on "the morals of its sources." Bickel, *supra*, at 81. It would inject enormous uncertainty into publishers' decisions and into First Amendment doctrine, not only in the relatively narrow context of Title III, but also in other areas of the law where legislatures and courts might attempt to erect similar prohibitions on dissemination of truthful, lawfully obtained information, engrafting new rules onto settled doctrines against trespass or other invasions of privacy.

The result would be a direct and significant intrusion on an important and "paradigmatically 'routine newspaper reporting techniqu[e].'" *Florida Star*, 491 U.S. at 538 (quoting *Daily Mail*, 443 U.S. at 103). Journalists regularly come into possession of information of great public interest from individuals who may well have violated a statute, a private contract, or some other legal or ethical duty either in obtaining the information or by disclosing it to the press. "Indispensable information comes in confidence from officeholders fearful of superiors, from businessmen fearful of competitors, from informers operating at the edge of the law who are in danger of reprisal from criminal associates, from people afraid of the law and of government—sometimes rightly afraid, but as often from an excess of caution—and from men in all fields anxious not to incur censure for unorthodox or unpopular views." Bickel, *supra*, at 84; *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (First Amendment bars punishment for publishing confidential information received from a source legally barred from divulging the information); *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969) (declining to impose liability on the press for obtaining information from source who obtained the subject information through an improper intrusion). Indeed, some of the most celebrated and important news in our nation's history has been the product of just such information, including the articles on the Vietnam war at issue in the *Pentagon Papers* case, articles uncovering Watergate,

groundbreaking articles on the health hazards of tobacco, and many others. *See, e.g.*, Alix M. Freedman, "Inside 'the Soul of Marlboro,'" WALL ST. J., Oct. 18, 1995, at A1 (Pulitzer Prize winning article based on confidential industry documents detailing, among other things, how tobacco companies regulate nicotine delivery in cigarettes); *see also* John C. Grabow, CONGRESSIONAL INVESTIGATIONS 250 (1988) (discussing controversy in 1812 over "leaks from an executive session of the House of Representatives" to an Alexandria, Virginia newspaper).

Petitioners' proposed regime of imposing statutory civil or criminal penalties on journalists simply because they knew or should have suspected that their source broke the law in providing information of public concern not only would punish the exercise of this traditional journalistic technique, but it also would inevitably lead to self-censorship. "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Sullivan,* 376 U.S. at 278-79. This is especially true when a plaintiff seeks punitive damages, which "pose an acute danger of arbitrary deprivation of property," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994), are assessed in "wholly unpredictable amounts bearing no necessary relation[ship] to the actual harm caused," and "unnecessarily exacerbate[] the danger of media self-censorship." *Gertz v. Robert Welch,* 418 U.S. 323, 350 (1974).

A journalist who, for example, lawfully receives a copy of a taped phone call from an anonymous source that seems to indicate that the President of the United States or some other high-ranking official had committed a serious crime, but who has no way of knowing for sure whether the call had been illegally intercepted, would be faced with a serious dilemma. Under petitioners' rule, the first thing a journalist would have to do is to examine not the accuracy or news value of the information, but the morals of the source, or even of the source's source. *Cf. Peavy*, 221 F.3d at 170-71 (describing reporters' efforts to determine whether the source obtained the information lawfully). As petitioners recognize, it is

altogether possible that a conversation could under Title III be legally (but secretly) recorded by one party to the conversation and then provided to the press. Pet. Br. at 41 n.20 (noting that "Congress clarified the statutory provision that generally allows recording of a communication by a party to the communication without the consent of the other party, . . . so as not to 'place[] a stumbling block in the path of . . . scrupulous journalist[s].'") (quoting S. REP NO. 99-541, at 17 (1986)). If a journalist is unable to confirm that the source had taped the conversation legally, or suspects that the tape may have been made illegally, publication would be prohibited, as would using the information on the tape as a basis for seeking out additional information from independent sources, unless the journalist were willing to risk criminal and civil punishment. This rule inevitably "would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." *Cox Broadcasting*, 420 U.S. at 496; *Florida Star*, 491 U.S. at 538 (same). And, if this Court were to adopt the sort of subjective, presumptively anti-publication, highly fact-dependent intermediate scrutiny test advocated by petitioners in this case, it would no doubt encourage all sorts of additional governmental efforts to punish or inhibit the publication of truthful, newsworthy speech based on lawfully obtained information.[4]

The constitutional safeguards of free speech and free press were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by

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[4] This concern is especially acute in the context of small towns, where there may be few media outlets, and where the publishers may not have the resources necessary to investigate the lawfulness of source conduct, or to finance litigation after publication. As a result, the material might not be published even if it were of great public concern and indisputably true.

the people." *Sullivan*, 376 U.S. at 269 (quotation omitted). The rule advocated by petitioners simply cannot be reconciled with this fundamental goal of the First Amendment.

II. Publication Of Truthful Information Of Public Concern Does Not Implicate A Legally Cognizable Privacy Interest That Trumps The First Amendment.

Deeply rooted common-law principles, incorporated into this Court's First Amendment privacy jurisprudence, also require rejection of petitioners' arguments.

A. The Common Law Has Always Barred Privacy Claims Based On Disclosure Of Truthful Information Of Public Concern.

Beginning in 1890, in the wake of publication of the celebrated Warren and Brandeis article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), a tort claim for invasion of privacy developed in the common law. The common-law principles of that tort provide an important backdrop for evaluating the First Amendment issues in this case. *See Cox Broadcasting*, 420 U.S. at 495.

The "central thesis" of the Warren and Brandeis article was "that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses." *Cox Broadcasting*, 420 U.S. at 487.[5] The privacy tort is usually

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[5] While petitioners have tried to cast this case as presenting an issue unique to the age of modern communications, concerns about the press' ability to obtain and widely disseminate information about individuals are not new. Warren and Brandeis, for example, expressed the same concerns regarding the journalists of their day: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the

[Footnote continued on next page]

recognized to have four possible "branches": (1) intrusion upon one's physical solitude or seclusion; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of one's name or likeness. *Id.* at 493 & n.22; RESTATEMENT (SECOND) OF TORTS § 652A (1977). Petitioners' claim against respondents for allegedly disclosing the contents of the taped telephone call is most analogous to a claim under the second branch—public disclosure of private facts.[6]

But Warren and Brandeis recognized that "[t]he right of privacy does not prohibit *any publication* of matter *which is of public or general interest.*" Warren & Brandeis, 4 HARV. L. REV., at 214 (emphasis added). This "public concern" exception to common-law privacy protections has been widely recognized. For example, Dean Prosser, in his famous 1960 article, emphasized that "the press has a privilege, *guaranteed by the Constitution*, to inform the public about those who have become legitimate matters of public interest." William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 411 (1960) (emphasis added). As stated by Prosser, "[t]he privilege of giving publicity to news, and other matters of public interest, arises out of the desire and

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resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers." Warren & Brandeis, 4 HARV. L. REV., at 196.

[6] Although petitioners argue that punishing respondents is warranted to deter the *interception* of telephone calls—an act that is analogous to the "intrusion" branch of the common-law privacy doctrine—they do not allege that respondents themselves engaged in such conduct, relying instead solely on the allegation that respondents illegally *disclosed* the taped contents of the call after it had been delivered to respondent Yocum by an "unknown person."

the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them." *Id.* at 412.[7]

To provide the greatest latitude to free speech and the free press, the concept of what is viewed as "newsworthy" or of "public significance" has always been viewed extremely broadly. *See id.* at 413 ("In determining where to draw the line the courts have been invited to exercise nothing less than a power of censorship over what the public may be permitted to read; and they have been understandably liberal in allowing the benefit of the doubt."); *see, e.g., Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (newsworthiness concept "properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment").

As early as 1894, in *Corliss v. E.W. Walker Co.*, 64 F. 280 (D. Mass. 1894), a federal court dismissed an action brought by a famous inventor who had claimed that the publication of his photograph, obtained from the inventor's wife, had violated his privacy rights. The court held that "[a] private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author,

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[7] *See also* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1255-69 (1976) (discussing common-law and constitutional principle that there can be no liability where the matters truthfully disclosed are "newsworthy"); Jonathan D. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 442 (1996) ("Once a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into the plaintiff's privacy rights[.]").

artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public." *Id.* at 282. Since then, numerous courts have recognized that "the right of privacy does not include protection from publication of matter of legitimate public or general interest," *Elmhurst v. Pearson*, 153 F.2d 467, 468 (D.C. Cir. 1946), and that the "right to be let alone" "must be accommodated to the need for reasonable latitude for the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy." *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966) (citation omitted).

Thus, for example, in *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), the D.C. Circuit strongly endorsed the right of the press to publish truthful information of public concern in the face of a privacy claim. In *Pearson*, two former employees of then Connecticut Senator Thomas Dodd entered the Senator's office without his authority, and made copies of numerous documents damaging to Dodd. The former employees gave copies of these documents to prominent newspaper columnists Jack Anderson and Drew Pearson, who published articles containing information taken from the Dodd documents. *Id.* at 703. Dodd then sued Pearson and Anderson for invasion of privacy.

The D.C. Circuit rejected Senator Dodd's claim, emphasizing that "[i]t has always been considered a defense to a claim of invasion of privacy by publication . . . that the published matter complained of is of general public interest." *Id.* (citing Warren & Brandeis, 4 HARV. L. REV., at 214-16). Summarily disposing of the "publication of private facts" facet of the case, the court concluded that the material "clearly bore on appellee's qualifications as United States Senator, and as such amounted to a paradigm example of published speech not subject to suit for invasion of privacy." *Id.* (footnote omitted).

The court also rejected Senator Dodd's "intrusion" claim, which was premised on the notion that the defendants had

intruded on the Senator's privacy by illegally obtaining the information from his files rather than by publishing it. The court concluded that "[i]f we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far." *Id.* at 705.

In *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980), the D.C. Circuit likewise refused to endorse a private claim for damages based on publication of truthful facts that were allegedly obtained illegally by a newspaper's source. In *Zerilli*, the Department of Justice was alleged to have illegally "bugged" the plaintiffs' office in the early 1960's, during which federal authorities intercepted certain communications between the plaintiffs and others. In 1976, several federal agents allegedly disclosed the contents of some of these communications to *The Detroit News*, which then published the material in a series of articles entitled "Organized Crime in Detroit." *Id.* at 218. The plaintiff brought a *Bivens* claim not only against the federal officials for the unlawful bugging, but also against the newspaper, asserting, among other things, that it had effectively conspired with the federal officials in violating the plaintiffs' Fourth Amendment rights by publishing the contents of the supposedly illegal wiretaps. The court rejected the plaintiffs' claim against the newspaper, concluding that "finding the newspaper liable in the present case would amount to holding a newspaper liable in damages for uncovering and publishing information that it deems newsworthy." *Id.* at 224.

The fundamental principle that publication of truthful information of public concern does not violate an individual's privacy rights remains the law today. In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), for example, the plaintiff, who had been a candidate for Captain of the Washington, D.C. police force, sued the Fraternal Order of Police, *The Washington Post*, and NBC for invading his privacy by publishing the true story that he

had initially tested positive for marijuana use. The court rejected the plaintiff's "publication of private facts" claim, holding that the matters disclosed were "squarely" of public concern. *Id.* at 517. The court further held that because the plaintiff was a public official, the concept of "newsworthiness" had to be viewed exceedingly broadly, including all matters "'which might touch on [the] official's fitness for office.'" *Id.* (quoting *Gertz*, 418 U.S. at 344-45). Citing the RESTATEMENT, the Court ruled that "with public officials, 'the legitimate interest of the public . . . may include information as to matters that would otherwise be private.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. e (1977)); *see also, e.g., Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998) (holding that "newsworthiness" is a "complete bar to common law liability" under the "publication of private facts" tort) (citation omitted); RESTATEMENT (SECOND) OF TORTS, § 652D (1977) (to impose liability for publication of private facts, plaintiff must prove that the published material "is not of legitimate public concern").

In short, "state privacy tort actions have been effectively squashed in nearly every instance when they have come into conflict with the constitutional guarantee of free press[,]" *i.e.*, where they have involved truthful, newsworthy disclosures. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1387-88 (1992).

B. This Court Has Incorporated Into Its First Amendment Jurisprudence The Common-Law Privilege Against Privacy Claims Based On Publication Of Truthful Information of Public Concern.

The foregoing common-law principles are directly relevant in deciding whether privacy interests are sufficiently compelling to override the First Amendment. This Court has looked to and incorporated these principles into its First Amendment jurisprudence. It has done so to determine whether the government's asserted interests are sufficiently compelling, and whether the "need" to protect those interests

is sufficiently important, to warrant restricting or punishing speech.

The Court has expressly recognized "that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him," "it has been agreed that there is a generous privilege to serve the public interest in news." *Time, Inc.*, 385 U.S. at 383 n.7 (citing twenty-two "representative cases in which the State 'right of privacy' was held to give way to the right of the press to publish matters of public interest"). In every instance that the Court has been required to resolve "the conflict between truthful reporting and state-protected privacy interests," *Florida Star*, 491 U.S. at 530, the Court has found that the published information was of public concern and that therefore its publication could not be subjected to punishment.

The Court's incorporation of the common-law "public concern" privilege into its First Amendment jurisprudence can be traced back at least as far as *New York Times v. Sullivan*, which relied upon the common law in holding that a public official who sues for defamation must prove that the defendant acted with "actual malice"—subjective knowledge that a statement is false or reckless disregard of falsity. *See Sullivan*, 376 U.S. at 269-82 (relying on *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942) (rejecting libel claim of congressman concerning article in *Washington Times-Herald*, holding that the "interest of the public" in the information, even if erroneous, outweighed the congressman's reputational interest)). The same year it decided *Sullivan*, the Court held in another defamation case that "[t]ruth may not be the subject of either civil or criminal

sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).[8]

Guided by its defamation cases, the Court three years later in *Time, Inc. v. Hill* extended the actual malice standard to "false light" invasion of privacy claims that involved matters of public concern. 385 U.S. at 388. In doing so, the Court, echoing the courts at common law, broadly defined the public concern standard to "'embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Id.* (quoting *Thornhill*, 310 U.S. at 102).

From the outset, the Court's privacy jurisprudence regarding *true* speech embraced a "public concern" privilege

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[8] Inasmuch as the speech now before the Court was indisputably true, petitioners' arguments would produce precisely the "perverse" anomaly envisioned by the Supreme Court in *Florida Star*, and recognized by the United States here (*see* U.S. Br. at 46-47), where "truthful publications . . . are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures[.]" *Florida Star*, 491 U.S. at 539. In such cases, where matters of public concern are at issue, truth is an *absolute* defense and the plaintiff has the burden of proving falsity. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). And in such a case, even if the plaintiff proves the speech is false, the plaintiff, at a minimum, must also show, with "convincing clarity," actual malice to obtain presumed or punitive damages, *Gertz*, 418 U.S. at 342, and the jury's verdict is subject to independent, *de novo* review by the trial court and on appeal. *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984). The United States' suggestion, at 46, that courts may someday find it necessary to read these requirements into Title III to save it from being invalidated under the First Amendment speaks for itself in this regard.

that both followed logically from *Sullivan* and *Time, Inc.* and, in significant part, looked to and mirrored common-law privacy doctrine. In *Cox Broadcasting*, for example, the father of a rape-murder victim brought an invasion of privacy action against a broadcasting company for disclosing in a news report his daughter's identity, which the broadcaster had learned from judicial records open to the public, in violation of a Georgia statute. 420 U.S. at 492. The Court, however, held that the First Amendment prohibited such a claim, emphasizing the "'public interest, secured by the Constitution, in the dissemination of the truth'," *id.* at 491 (quoting *Garrison*, 370 U.S. at 73), and that the broadcast involved a matter of *public* concern, as opposed to revelation of "very private matters unrelated to public affairs." *Id.* at 491.

Citing, among other things, the Warren and Brandeis article, the Court noted "a strong tide running in favor of the so-called right of privacy." *Id.* at 488. But despite these "impressive credentials for a right of privacy," *id.* at 489, the Court pointedly observed that the plaintiff's claim in *Cox Broadcasting* would have failed at common law. *Id.* at 493-95. The Court found the fact that the publication at issue was privileged as a matter of common-law privacy doctrine to be "compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press." *Id.* at 495.

The Court's subsequent privacy cases have even more forcefully articulated a constitutional "public concern" privilege protecting the publication of truthful information. In *Daily Mail*, the Court for the first time synthesized its prior rulings into a succinct principle of strict First Amendment scrutiny: that publication of lawfully obtained and truthful "information about a matter of public significance" cannot be punished "absent a need to further a state interest of the highest order." 443 U.S. at 103. *Daily Mail* involved a criminal prosecution of a newspaper which learned of a shooting at a junior high school by monitoring a police band radio frequency, obtained the name of the alleged

juvenile assailant by interviewing witnesses, police and the prosecutors, and then published the juvenile's identity in violation of a West Virginia statute. In ruling that application of the statute violated the First Amendment, the Court squarely rejected the argument, made here by petitioners, Pet. Br. at 43, that the strict scrutiny test applied only in "situations where the government itself provided or made possible press access to the information." 443 U.S. at 103. Instead, the Court held that strict scrutiny applied because "respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferances of government to supply it with information." *Id.* at 103-04.

The Court's decision in *Florida Star*, 491 U.S. at 532, further illustrates the broad sweep of the First Amendment "public concern" privilege. Because the news article related to a matter of public concern—criminal proceedings regarding a rape—the Court struck down the imposition of $75,000 in compensatory and $25,000 in punitive damages against *The Florida Star* newspaper for publishing the name of a rape victim in violation of a Florida statute, even though the privacy interests at stake were "highly significant" and the actual injury to the plaintiff was a "tragic reality."[9] The

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[9] 491 U.S. at 537 ("At a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests."); *id.* at 528 (plaintiff testified that "she had suffered emotional distress from the publication of her name. She stated that she had heard about the article from fellow workers and acquaintances; that her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling."); *see id.* at 542 (White, J., dissenting).

Court struck down application of the statute in part because it failed to incorporate protections and defenses that govern "claims based on the common-law tort of invasion of privacy." *Id.* at 539.

To be sure, the Court left open the possibility that in some future circumstance, a governmental interest might be so compelling and the need might be so "overwhelming[]" that it would sustain a punishment against a newspaper for publishing truthful information. *Id.* at 537. The Court's analysis, however, suggested that it would only consider doing so in extraordinary circumstances not even remotely present here—to punish the publication of purely private facts of no public interest that did severe harm to a private individual, *id.* at 532-33 & 537, or to punish the publication of information that directly, immediately, and irreparably injured national security. *Id.* at 532 (citing the prior restraint case of *Near v. Minnesota*, 283 U.S. 697, 716 (1931), which hypothesized that only extreme circumstances such as "'publication of the sailing dates of transports or the number and location of troops'" during war might possibly warrant such a restraint).

C. Broadcast Of The Tape Did Not Implicate Any Legally Cognizable Privacy Interest Sufficient To Trump First Amendment Protections

Here, because the tape of the telephone call was clearly of public concern, the radio stations' broadcast of it simply did not implicate any legally cognizable privacy interest that overrides the First Amendment. Accepting all of their allegations as true, Ms. Bartnicki and Mr. Kane would have no common-law claim for invasion of privacy against respondents, and that fact is "compelling" evidence that it is not necessary to punish respondents' broadcast of the tape to vindicate a governmental interest of the highest order. *See Cox*, 420 U.S. at 496. Since the information is about a matter of public concern, petitioners, as with Senator Dodd in the *Pearson* case, would be barred from bringing a common-law "public disclosure of private facts" claim.

Nor could petitioners bring a common-law "intrusion" claim against respondents, who received the tape from an unknown person. Liability for intrusion generally attaches only where a defendant "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns [and] . . . the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977). There is no claim in this case that the radio stations participated in any way in the interception of the telephone call or engaged in otherwise intrusive conduct, just as there was no allegation that the journalists in *Pearson* had broken into Senator Dodd's office.[10] That is why petitioners' "Peeping Tom" (Pet. Br. at 35) and "multiple eavesdroppers" (U.S. Br. at 39) analogies are so inapt: respondents did not "look through a key hole [a Peeping Tom] had made," Pet. Br. at 35, "listen in on a

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[10] *See also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 719 (4th Cir. 1991) (there can be no liability for intrusion where the media defendant "played no role in leaking the letter" that formed the basis of its story, and which had been provided by a source "in violation of government policy."); *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 656 (Md. Ct. Spec. App. 1979) (no intrusion claim where newspaper secured confidential student transcripts from source, because "the information, though perhaps emanating *ultimately* from confidential University records, was not obtained by any personal act of invasion or intrusion" by the newspaper) (emphasis in original); *Sheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1526 (E.D. Pa. 1990), *aff'd*, 946 F.2d 202 (3d Cir. 1991) (rejecting claim that press unlawfully received confidential police report through a conspiracy with unnamed police sources, on ground that reporter who simply copies information contained in the report "would not be a receiver of stolen goods.").

conversation," or otherwise intrude upon the petitioners' solitude, seclusion, private affairs or concerns.

Although petitioners claim that it is "difficult to conceive of a more fundamental assault on individual privacy" than the broadcast of the tape of Bartnicki's and Kane's discussion "of their strategy regarding a labor dispute," Pet. Br. at 30, they do not even claim that they suffered any actual injury from the broadcast. Indeed, it would make a mockery of both the First Amendment *and* the right of privacy if petitioners, union officials who voluntarily involved themselves in a public controversy and who allege no actual harm, were to be permitted to collect damages in this case, while the private-figure plaintiff in *Florida Star*, who testified in detail regarding the actual injury she suffered when it was publicly disclosed that she had been raped, was barred from recovery.

For similar reasons, petitioners' effort to justify Title III by claiming that disclosure by the press of the contents of the call "magnified" and "compound[ed]" the harm caused by the interception, U.S. Br. at 39, 43; Pet. Br. at 35, ignores the fact that petitioners do not contend that they suffered any actual injury from the interception itself. Moreover, even assuming that they had, because the information disclosed by the radio stations did not relate to private matters but to matters of public concern, the *broadcast* of that information did not inflict any harm on petitioners' "privacy" as that concept has long been understood under the common law and the Constitution.

Finally, petitioners argue that it is necessary to punish the radio stations for broadcasting the tape on the remote possibility that it will "'dry up the market' for unlawful intercepted communications" and thereby deter illegal interceptions of cellular telephone calls. Pet. Br. at 16; U.S. Br. at 14 ("Only by removing the 'market' for illegally intercepted communications could Congress effectively deter the underlying misconduct."). But the First Amendment prohibits imposing punishment of respondents' truthful speech as a mechanism for deterring illegal conduct—the

"illegal surveillance itself" (U.S. Br. at 37)—that respondents themselves are not even accused of committing. *See Landmark Communications*, 435 U.S. at 837, 840-41 (refusing to uphold punishment against a newspaper, a "stranger[] to the inquiry," that received an illegal leak from a confidential judicial disciplinary proceeding and rejecting argument that punishing paper was needed to "minimize" the "harmful consequences" of the leak and to ensure that "the guarantee of confidentiality is more than an empty promise").

Moreover, petitioners offer no evidence to support their speculative theory of deterrence. To the contrary, petitioners admit that their claim in this regard is "unprovable." Pet. Br. at 38 n.18. In the end, this argument is based on "little more than assertion and conjecture," which is insufficient to justify punishment of truthful speech—under strict scrutiny, *Landmark Communications*, 435 U.S. at 841 ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."), as well as under the intermediate scrutiny test advocated by petitioners in this case. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.") (quotation omitted); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) ("regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose'") (citation omitted).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* THE LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1/]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, The Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, which restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. The Liberty Project has been particularly involved in defending the right to privacy, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual. The Liberty Project is also dedicated to staunching the increasing tendency of legislatures, looking for more expeditious routes to deter and punish illegal conduct, to create laws designed to confiscate the spoils of illegal activity – laws that are used against the innocent as well as against criminals.

This case implicates each of these concerns – free speech, privacy, and a legislative effort to punish the innocent in order to deter illegal conduct by others – and requires the Court to determine the constitutional framework governing government attempts to regulate and punish private action in light of them. Because of The Liberty Project's strong interest in privacy, in protection of citizens from government overreaching, and in the freedom of all citizens to engage in expression without government interference, it is well situated to provide this

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1/ The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

Court with additional insight into the issues presented in this case.

SUMMARY OF ARGUMENT

The right to privacy is a right to be free from *government* intrusion. Freedom from intrusion by other private citizens is also widely valued and important. But, as a free society, we must be wary of relying on the government to protect us from each other when it does so by trampling on the freedoms guaranteed to all under the Constitution. The government embarks on a radical departure here in attempting to lower the bar for reviewing a complete ban of truthful speech on matters of public concern on the ground that the speech itself is harmful. Its proffered bases for justifying that ban are woefully insufficient and represent a disturbing and significant attack on First Amendment freedoms.

The government is, of course, entirely within its power to impose sanctions on those who use eavesdropping technology, or are co-conspirators or accessories after the fact by paying someone to eavesdrop. *See* 18 U.S.C. § 2511(1)(a). But the application of the statute here, which broadly criminalizes truthful speech on issues of importance to the community (such as school union negotiations) simply because *someone else* misbehaved in obtaining that information, is antithetical to longstanding principles of First Amendment jurisprudence.

1. Application of section 2511(1)(c) to ban truthful speech by innocent third parties in order to prevent the harms the government fears will be caused by the communication itself triggers exacting scrutiny. The government's attempt to pass this ban off as a harmless adjunct to legitimate conduct legislation is a gross mischaracterization. The most fundamental First Amendment values are at issue here because the government is attempting to ban speech because it does not

want that speech to be heard by anyone, anywhere, under any circumstances. When the government's aim is to silence would-be speakers from providing truthful information, its legislative impositions must be subjected to very careful review, regardless of whether the regulation applies to speech on a specific subject matter or speech on any subject and regardless of whether the government undertakes to ban only speech or chooses also to impose related regulations on non-speech activities. Part I.

2. The government has not asserted any interests sufficient to justify its sweeping censorship of speech on matters of public concern by those who have not engaged in any misconduct in acquiring the information.

a. The government's asserted interest in deterring speech that might have the effect of discouraging others from speaking has never been recognized as a justification for censorship and is fundamentally inconsistent with First Amendment protections. Part II.A.

b. Prohibiting speech on the theory that publicity might encourage a crime is also utterly inconsistent with longstanding First Amendment jurisprudence. Inducing someone to commit a crime by paying him, before or after the fact, is the type of involvement in criminal activity that can be legitimately made subject to sanctions, and often is. But imposing sanctions on pure speech because someone may commit a crime in the hope of media coverage is something entirely different. It is not consistent with our constitutional freedoms to permit the government to take the shortcut of pronouncing speech itself off limits as a means of deterring unlawful conduct by someone else entirely. Part II.B.

c. The government's asserted interest in encouraging the use of new technology provides no basis for intruding on

constitutional rights – which even the government admits are implicated here. Part II.C.

d. The government's asserted interest in safeguarding the feelings and positions of those spoken about is insufficient to justify the broad prohibition of the speech of innocent third parties that the government seeks to enforce here. Part II.D.

e. Finally, the government's decision to ban speech without considering various non-speech alternatives that would have been as effective, or more effective, in furthering its goals renders the application of the statute here invalid under any measure of First Amendment scrutiny. The government's decision to ban speech rather than to prohibit or restrict the sale of eavesdropping technology, or to require manufacturers of communication devices to incorporate or make available technologies that defeat eavesdropping, is not a choice the First Amendment permits. Part II.E.

ARGUMENT

I. APPLYING SECTION 2511(1)(c) TO SILENCE INNOCENT THIRD PARTIES IS NOT THE TYPE OF REGULATION THAT HAS EVER BEEN FOUND TO TRIGGER ONLY INTERMEDIATE SCRUTINY.

Petitioners attempt to shoehorn Section 2511(1)(c) into various categories of laws requiring less than strict constitutional scrutiny by describing it alternatively as (1) a content-neutral regulation of speech, (2) a law of general application, and (3) a regulation unrelated to suppressing speech that incidentally has the effect of suppressing it. But the application of section 2511(1)(c) here – to speakers who have not engaged in any misconduct in acquiring the information they wish to communicate, based on the government's desire not to have that information communicated – cannot be made to fit any of those categories. Imposing criminal sanctions and

civil liability simply for speaking the truth, because the government does not want that truth expressed publicly, is precisely the type of government action that has consistently been subjected to exacting scrutiny. Petitioners' contrary arguments do not take adequate account of salient characteristics of the regulation at issue and of this Court's First Amendment jurisprudence and thus are inconsistent with longstanding First Amendment doctrine.

A. That a Statute Applies to Speech Regardless of Subject Does Not Always Justify Lower Scrutiny.

Petitioners' suggestion that any regulation of speech that is not directed to a particular subject matter is subject at most to intermediate scrutiny is inconsistent with numerous decisions of this Court. For example, the application of defamation laws is significantly constrained by the First Amendment, not because defamation laws punish speech on any particular subject matter or speech advocating any particular viewpoint but because defamation laws specifically and purposefully suppress speech and threaten to deter truthful speech. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (false statements about public officials, absent malice, cannot constitutionally be punished, recognizing that: "Whatever is added to the field of libel is taken from the field of free debate.") (quotation and citation omitted); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

Similarly, even content-neutral taxes imposed speech are subject to strict scrutiny if they are imposed differentially on First Amendment activities, because they single out speech for an unnecessary burden. *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating tax on newspaper and motion picture advertisements); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)

(invalidating tax on newsprint); *accord Leathers v. Medlock*, 499 U.S. 439, 446 (1991) (differential taxation "places such a burden on the interests protected by the First Amendment, that it is presumptively unconstitutional") (quotation and citation omitted).[2/]

Furthermore, this Court has expressly held that regulations that focus on the communicative impact of speech trigger strict scrutiny. In doing so, the Court has explained that when the government regulates speech because of concerns about the impact of that speech, the regulation requires strict scrutiny even if it is not directed at speech on any specific subject. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), for example, the Court applied exacting scrutiny to invalidate an ordinance imposing fees for demonstrations and parades, on any subject, based on the cost to the government of maintaining public order. The Court reasoned that the costs of maintaining order were costs associated with the public's reaction to the speech, *id.* at 134, and that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Id.* at 137. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988) (a regulation justified by "the direct impact that speech has on its listeners" is content-based).

The application of the statute at issue here is similarly focused on the communicative impact of the speech that is prohibited. The government's interest in banning that speech

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2/ *Butterworth v. Smith*, 494 U.S. 624 (1990), also arguably falls within the same rubric. Although the statute at issue prohibited disclosure of only grand jury testimony, it prohibited disclosure of such testimony on any subject matter, and could therefore be classified as a content neutral restriction. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992). Nonetheless, the Court applied exacting scrutiny, and despite finding that the ban was likely to further certain state interests, 494 U.S. at 634, held the ban of truthful speech unconstitutional, *id.* at 635-36.

is to prevent listeners from learning what the speakers would say. *See, e.g.*, Gov. Br. 39 (stating the government's interest in preventing the information from being "disseminated to a wider audience"). That is not the type of regulation for which intermediate scrutiny has ever been held sufficient. Content-neutrality can be a relevant indicator that a regulation of, for example, sound trucks or media cross-licensing is not attempting to censor speech and will not likely result in silencing speakers. But when the government's concern is the public's reaction to the speech and its *aim* is censorship, this Court has always applied strict scrutiny – and it must do so here if the First Amendment is to maintain its vigor.

B. That a Statute Also Regulates Non-Speech Activities Does Not Always Justify Lower Scrutiny.

Petitioners' suggestion – that a statute's direct prohibition of speech is insulated from exacting scrutiny if the statute also regulates conduct – would also represent a significant departure from this Court's First Amendment jurisprudence. Although this Court has recognized that a law regulating general conduct can be applied to media businesses without triggering heightened scrutiny, this Court has never found that rational basis scrutiny is applicable to a law aimed specifically, like this one, at censorship. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), typifies the circumstances under which heightened scrutiny is not required for the enforcement of a law of general applicability. There, a newspaper was sued for breach of its voluntary agreement to maintain a source's confidentiality. The Court applied rational basis scrutiny in upholding the enforcement of that agreement, recognizing that "any restrictions that may be placed on the publication of truthful information are self-imposed." *Id.* at 671. The government

regulation at issue – contract law – reflected no government preference for silence.

In contrast, the law at issue here does reflect the government's preference for silence and is not, by any recognized definition, a law of general applicability. Section 2511(1)(c), on its face, prohibits speech. It expressly bans disclosure, or attempted disclosure, of certain communications. That express ban is wholly unlike the general contract law at issue in *Cohen v. Cowles Media*. That a separate provision of the statute, Section 2511(1)(d), additionally bans use of information gleaned from intercepted communications, does not change the nature or the purpose of the ban Congress enacted against speech. Further, conduct regulation is a particularly minor aspect of *this* statute. The primary use of recorded conversations by private individuals, and virtually the only use by an innocent acquirer, is disclosure.

The government attempts to support the opposite conclusion by referring to "industrial espionage" – in which, presumably, one person engages in eavesdropping on a private conversation and then provides the information learned to one of the participant's business competitors. Industrial espionage, however, by its very nature does not involve "innocent" disclosure or receipt of information. Either the competitor hires the eavesdropper in the first place or it pays for the information after the fact. In both cases, the third party' acquisition and use of the information is not innocent and is not analogous to the public disclosure of innocently acquired information on matters of public concern at issue here. Not surprisingly, petitioners present no examples of a use other than communication that might be made by an innocent acquirer. *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (recognizing that the burden

of even seemingly general laws may impermissibly fall on the exercise of constitutional rights).

Moreover, this Court has repeatedly reviewed specific applications of laws to speech activities under exacting scrutiny, even when – unlike here – the laws *could* fairly be characterized as laws of general applicability. Thus, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982), the Court held that the tort imposing liability for interfering with business relations could not constitutionally be enforced against the organizers of a political boycott, regardless of the damages caused the businesses that were boycotted. Similarly, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court limited the permissible applications of the tort of intentional infliction of emotional distress to constitutionally protected speech.

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court ruled that a state law proscribing disturbances of the peace could not constitutionally be applied to punish peaceable civil rights demonstrators. Although considerable testimony indicated violence was about to erupt in reaction to the demonstration, the Court found that the innocent demonstrators could not be silenced – even under this law of general applicability – simply to further the government's interest in maintaining the peace. Even though silencing the demonstrators would have been an effective and easier means of keeping the peace, the First Amendment's guarantee of free speech required the government to choose a more arduous method – deploying city, sheriff's office and state police, firemen and fire trucks to keep the peace – instead. 379 U.S. at 550-51. Likewise, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) this Court ruled that an ordinance proscribing disorderly conduct could not constitutionally be applied to a provocative speaker, even

though silencing the speaker would have served the government's interest in maintaining order. *Id.* at 5.

More recently, this Court has subjected application of general public accommodations law to strict scrutiny when it intrudes on expressive association rights by requiring inclusion of a message to which the association objects on ideological grounds. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

All these laws are laws of general applicability. But use of these laws to intrude on First Amendment rights was recognized as a violation of the First Amendment, absent far more compelling state interests. Such exacting scrutiny is appropriate here, because the provision at issue here – by expressly punishing disclosure by third parties who are not involved in eavesdropping themselves – is both on its face, and in practical effect, a direct prohibition of speech.[3/]

C. That a Statute Has a Legitimate Ultimate Aim Does Not Justify Lower Scrutiny When the Statute Bans Protected Speech.

This Court's recognition that a more relaxed scrutiny is appropriate for regulations in which the government's purpose is "unrelated to the suppression of free expression," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), was not intended to govern – as petitioners would prefer it – whenever the government's ultimate goal is something other than pure censorship. Rather, this Court recognized the very different

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3/ Petitioners' argument that the provision is subject to only intermediate scrutiny because it isolates speech based on its source begs the relevant questions. Laws banning disclosure of all information learned from the government, or from publications in foreign languages, would equivalently define the proscribed speech by its source. They would also be unconstitutional.

proposition that *O'Brien* scrutiny is appropriate when the government has not aimed at suppression of speech *even as a means* toward its ultimate end.

If *O'Brien* scrutiny were applicable to every law that serves an ultimate goal other than pure censorship, no speech restriction would ever trigger strict scrutiny. Every law that has ever been held invalid under the First Amendment could be described as serving an ultimate goal other than censorship. The government's interest in deterring defamation is to prevent economic loss and social embarrassment to the victim. The government's interest in silencing speakers who are angering an assembled crowd is to avoid harm to people and property. The government's interest in regulating charitable solicitation is to prevent fraud. Even the statute struck down in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), was aimed at preventing the crimes and violence that might follow advocacy of such tactics, not the advocacy for its own sake.

Thus, a law falls within *O'Brien*'s "unrelated to the suppression of free expression" category only when the government has not tried to suppress free expression *even as a means* to a different end. The laws at issue in *O'Brien* and much of its progeny prohibited only conduct. The constitutional issues arose only when someone engaged in that conduct for an expressive purpose. *See, e.g.*, 391 U.S. at 381-82; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

Although *O'Brien* scrutiny has since been applied to speech regulations, it has never been applied to regulations when the interest asserted to justify that regulation was to prevent communication of information because the communication in itself was thought to be harmful. To the contrary, *O'Brien* scrutiny has been found appropriate only for speech regulations that were not promulgated in order to

prevent communication. Thus, the cable must-carry regulations upheld in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), were not enacted because the government affirmatively wanted any non-broadcast programming silenced. To the contrary. To the limited extent the requirement to carry broadcast stations resulted in non-carriage of any other programming, it was an unfortunate byproduct of the government's attempt to safeguard broadcasters. The government had no interest in preventing cable operators from carrying non-broadcast programming. Indeed, its goals were even better served when cable operators used existing capacity, or expanded capacity, to carry both broadcast signals and all the cable programming they wish. 512 U.S. at 663.

Similarly, the trademark-like statute upheld in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), also was not enacted because the government wanted to preclude information or opinion about the Olympics from reaching the public. The statute simply limited trade name and advertising usage of the word "Olympics" to the Commission responsible for the United States's participation in the international events, so that the Commission could reap the commercial benefits of its investment. The government had no interest in placing any limits on any message about the Olympics or any other athletic contest. *Id.* at 536.

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), is not to the contrary. In *Seattle Times*, this Court recognized the unremarkable proposition that when the government wields its police power to intrude on the privacy rights of its citizens it can attempt to ensure that the intrusion is not broader than justified. The only information subject to the rule upheld in *Seattle Times* was information acquired by using the government's police power – through the judicial discovery

process. Indeed, restrictions on the use of information litigants acquire on their own have long been considered invalid. *See, e.g., Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (ordering litigants not to use documents or information obtained before discovery violates "their First Amendment rights to disclose such documents and information free of governmental restraint"); *Schlaifer Nance & Co. v. Estate of Warhol*, 742 F. Supp. 165, 166 (S.D.N.Y. 1990) (inherent power does not permit courts to restrict use of information innocently obtained from third parties without the use of judicial process); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074 (1988) (same).[4/]

In contrast, the case at bar is fundamentally different from *O'Brien* and progeny, because the government is regulating speech on the ground that "the communication . . . is itself thought to be harmful." *O'Brien*, 391 U.S. at 382 (relying on the critical difference between such regulations and the regulation at issue in the case before it). The government enacted section 2511(1)(c) because it objected to the disclosure of certain information to the public.[5/] As the government itself

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4/ Although the copyright laws have not been considered subject to *O'Brien* scrutiny, they demonstrate the same absence of any government interest in censoring speech. The government's purpose in providing property rights to original authors through copyright is unrelated to censorship. Copyright is intended to encourage authors to create works and distribute them to the public. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 545 (1985); *see also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (securing performers' right of publicity, like copyright, encourages artists to create and publicly perform their work). Moreover, copyright does not prohibit disclosure of any information or ideas in a protected work.

5/ Section 2511(1)(c) prohibits both disclosure of an entire conversation and disclosure of any facts learned from a recording of such a conversation because it expressly prohibits the disclosure of "the contents"

acknowledges, a key government purpose here is to silence those who might otherwise publish the recorded conversation "to a wider audience." Gov. Br. 39. In other words, the government's concern is triggered by the *communicative impact* of such disclosures. It is attempting to prevent a wider audience from learning the content of such conversations and reacting accordingly to the discomfort or inconvenience of the participants. *See id.* at 34-35, 39. Thus, the regulation can be upheld only if it satisfies exacting scrutiny.

II. THE GOVERNMENT'S ASSERTED INTERESTS ARE INSUFFICIENT TO OVERRIDE INNOCENT DEFENDANTS' CONSTITUTIONAL RIGHTS.

The interests the government asserts here are insufficient to justify its broad censorship of truthful speech on matters of public concern. It has long been recognized "that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quotation and citation omitted). "The First Amendment affords the broadest protection" to such speech. *Id.* The government's asserted interests, however legitimate, are not so substantial as to overcome the First Amendment rights of those who have not wrongfully acquired the information they wish to publish.

A. Encouraging Private Speech

The government's asserted interest in encouraging people to engage in highly private conversations is very different from the pro-speech government interests this Court has previously recognized in reviewing First Amendment challenges to government actions. The government interests previously recognized as promoting pro-speech values are government

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of such conversations. *Cf.* Bartnicki Br. 17.

interests in encouraging the wide dissemination of information and opinions – not the encouragement of private conversations.

Thus, in *Turner I*, the Court recognized that regulations aimed at "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." 512 U.S. at 663. The Court found that the government, in enacting those regulations, was acting to further a longstanding policy in encouraging "the widest possible dissemination of information." *Id.* (quotation and citation omitted). The Court has also recognized that a public university acts to further the values of the First Amendment when its purpose is "facilitating the free and open exchange of ideas by, and among, its students" by subsidizing student groups and activities. *Bd. of Regents v. Southworth*, 120 S. Ct. 1346, 1354 (2000); *id.* at 1360 (Souter, J., concurring).

The allegedly "pro-speech" interest asserted by the government here is wholly different. It is not aimed at encouraging the "uninhibited, robust and wide-open" debate on public issues that is at the heart of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. at 270. To the contrary, it "advances . . . the choice *not* to speak publicly," and attempts to prevent information from being "disseminated to a wider audience." Gov. Br. 34, 39.

It is far from clear that such a goal furthers any *First Amendment* value at all – as opposed to another type of interest altogether. Indeed, the doctrines petitioners raise in support are entirely different. For example, the right not to speak recognized in *Wooley v. Maynard*, 430 U.S. 705 (1977), was a right not to be required to convey an ideological message which was repugnant to one's own beliefs. *Id.* at 707; *accord Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997); *cf.* Gov. Br. 34. Neither of the individual petitioners

were required by anyone to convey any message they found ideologically repugnant. To the contrary, they voluntarily chose not to remain silent and they voluntarily chose the subject matter of the conversation and the points of view they espoused. Thus, the government's prohibition of speech even by innocent third parties is scarcely justified by any need to protect *Wooley v. Maynard* type values.

Petitioners' comparisons to doctrines recognizing property rights in speech activities are equally unavailing. The principle underlying copyright is that providing authors with the right to control distribution, and therefore charge for it, provides an incentive for them to create works and distribute them to the public. Although relying on property principles therefore necessarily permits authors to choose not to distribute their work for a limited time period, the government has little interest in encouraging secret expression. To the contrary, the government's interest is to encourage *public* expression. "[C]opyright is intended to increase and not to impede the harvest of knowledge." *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 545 (1985); *id.* at 545-46 (noting that copyrights foster the original works "that provide the seed and substance of this harvest.").

Similarly, in recognizing Zacchini's right to publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court explained that the value of the protection was to provide "an economic incentive for him to make the investment required to produce a performance of interest to the public." *Id.* at 576 (noting that the "same consideration underlies the patent and copyright laws"); *cf.* Bartnicki Br. 17. The Court further justified its decision on the ground that "neither the public nor [the broadcaster] respondent will be

deprived of the benefit of [Zacchini's] performance" as long as Zacchini is properly compensated. 433 U.S. at 578.[6/]

Importantly, it has long been understood that the government's power to create property rights even for the purpose of encouraging *public* speech is limited by the First Amendment. Thus, copyright law survives First Amendment challenges because it does not restrict publication of either the facts or the ideas that are contained in a copyrighted work. *Harper & Row*, 471 U.S. at 560. Similarly, *Zacchini* made clear that the media remains free to report the event. 433 U.S. at 569. And *San Francisco Arts & Athletics* made clear that it was only upholding a restriction on the use of trade names as a designation of source. Everyone, however, remains free to refer to organizations by their trade names in writing about them. 483 U.S. at 536 n.14. In contrast, the statute challenged here prohibits disclosure of "the contents" of any covered communication – *i.e.*, the subject matter, the ideas expressed, the facts asserted, etc. 18 U.S.C. § 2511(1)(c).

Even if protecting secret conversations is legitimately a *speech* interest – rather than some other interest – it can only be regarded as a relatively weak one that does not outweigh the interests of other speakers to report on matters of public concern, when they have engaged in no misconduct to acquire the information. Those speakers' constitutional right to discuss

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6/ The right to exclude urged by *amicus* Boehner has *not* been recognized as a right under the speech clause. It has been recognized as a right under the assembly clause when inclusion would send a message to the public contrary to an association's beliefs. That value is not at issue here, where the participants object to their actual beliefs being expressed to the public and where they remain in unfettered control of what that message will be. *See* Boehner Br. 5 (citing only freedom of association decisions – *California Democratic Party v. Jones*, 120 S. Ct. 2402 (2000), and *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000)).

matters of public concern has long been recognized as "the core value of the Free Speech Clause of the First Amendment." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968).

Essentially, petitioners' "pro-speech" argument boils down to banning speech because it might discourage others from speaking. Permitting the government to ban speech on that basis would be a precipitous departure from First Amendment jurisprudence that could be wielded against much of the speech this Court has carefully safeguarded under that Amendment's auspices. Speech by some often discourages speech by others. Politically motivated boycotts have been aimed at discouraging the speech activities of the owners. *See, e.g.*, Jill Stewart, *Free This Man: Can Black Conservatives Speak Their Minds in America?*, New Times (L.A.), July 3, 1997 (article about boycott of companies that sponsored a radio talk show). Labeling a position "racist" or "sexist" or "Communist" is intended to constrain the speech of those accused, and often does. Loud, fierce, or sarcastic speech often encourages the rest of us to suppress our own views rather than responding. Thus, if petitioners' "pro-speech" argument prevails, then the principle that the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp" speech, *New York Times Co. v. Sullivan*, 376 U.S. at 270, is no longer secure. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1107-10 (2000) ("*Volokh*").

Any suggestion by petitioners that private speech should be regarded as a property right simply begs the First Amendment question rather than answering it. That copyright and publicity rights, under specific circumstances, have been upheld against First Amendment challenges does not mean that anything designated a property right will or should automatically obtain

the same result. For example, states have viewed individuals and businesses as having a property interest in their reputations. *See, e.g., Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980) (business reputation is a property interest under Florida law); *Nossen v. Hoy*, 750 F. Supp. 740, 743 (E.D. Va. 1990) (individual reputation is a property interest under D.C. and Virginia conversion law). Nonetheless, those "property" interests must give way when they intrude on First Amendment rights. *See, e.g., Hepps*, 475 U.S. at 768-69; (determining "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment") (quotation and citation omitted); *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. Similarly, freedom from interference with business relations is a property right, but it necessarily gives way when enforcement of that right would improperly deprive others of their free speech rights. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. at 921 (organizers of political boycott cannot be held liable for damages for interfering with business relations because peaceful boycott is protected exercise of free speech).

If the discouragement of speech *by speech* can be regarded as the evil to be overcome, through designation of a property interest or otherwise, the guarantee of free speech will become so drastically curbed as to be unrecognizable. The government, for example, could impose criminal and civil sanctions on authors and publishers of unauthorized biographies on the ground that they have violated property rights the subjects have in the details of their lives. *See Volokh* at 1064. Indeed, the government could punish anyone who reviewed a book without express permission from the author or anyone who reported the contents of a candidate's remarks at a fundraising luncheon.

Although this particular statute is limited to technologically intercepted conversations, the theory urged by

petitioners is not. It is just as arguable that the prospect of critical, even vicious, reviews deters authors from writing and that candidates will speak more candidly among supporters if assured that their remarks will not be reported more broadly. If the government is privileged to censor speech whenever that speech might discourage others from speaking freely, there will be little left of the Framers' guarantee. The government's so-called "pro-speech" interest, therefore, cannot provide a basis for upholding the statute's punishment for engaging solely in speech activities.

B. Deterring Interception

The government's suggestion that punishing the speech of innocent acquirers will deter others from unlawfully intercepting conversations – even if it were true – would not justify the suppression of the speech rights at issue here. The purported precedents on which petitioners rely establish the very different proposition that deterrence is a sufficient interest when no or virtually no speech interests are burdened. Thus, receiving stolen goods may be punished providing the legislature's decision to do so is not utterly irrational. No First Amendment interests are implicated.

Petitioners' reliance on *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), as providing precedent for the statute at issue here is equally unavailing. The Court did not hold in those cases that deterrence of any unlawful activity was an interest sufficient to outweigh core First Amendment rights. To the contrary, the Court held that the First Amendment interests claimed in those cases were "exceedingly modest, if not *de minimis*," 458 U.S. at 762; 495 U.S. at 108.

Moreover, the Court found that the government interest in deterring the particular crime at issue – sexual exploitation and

abuse of children – "constitutes a government objective of surpassing importance." 458 U.S. at 757. The dangerousness and particularly reprehensible nature of sexual exploitation of children justified a speech ban that other deterrence rationales have not justified. *Compare Stanley v. Georgia*, 394 U.S. 557 (1969) (invalidating law outlawing the private possession of obscene material because state had little interest in controlling what an adult viewed in his own home) with *Osborne v. Ohio*, 495 U.S. at 108 (upholding law outlawing the private possession of child pornography "because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*").

These cases demonstrate that the government's alleged deterrence interest is woefully insufficient to justify the statute at issue here, which prohibits speech on matters of public concern. That speech is not a *de minimis* First Amendment value, it is "the core value of the Free Speech Clause." *Pickering*, 391 U.S. at 573. The only deterrence interest that has been recognized as sufficient to censor *that* speech is imminent violence. *See, e.g., Brandenburg v. Ohio*, 395 U.S. at 447. In contrast, the illegal eavesdropping the government seeks to deter here, although certainly objectionable, does not involve the danger of violence or child abuse, and can scarcely be considered a government objective of surpassing importance. Thus, under current First Amendment doctrine, an interest in deterring unlawful interception by punishing innocent third parties – even if there was some basis to believe it would be effective – is insufficient to justify the ban on speech imposed here.

Moreover, the underlying rationale of the government's argument is particularly disturbing because it punishes speech based solely on the predicted effect of publicity on a criminal's motivation to commit a crime. Under that logic, the media

could be prohibited from reporting about crimes, in the interest of deterring copycat crimes. Likewise, the media could be prohibited from covering political protests in which the protestors block thoroughfares or trespass or resist arrest or commit acts of vandalism. Certainly, protests are motivated in large part by the potential of media coverage to spread the protesters' message. If the media are not permitted to report on or show videotape of protests that involve any infraction of the law, arguably protestors would be less likely to commit such infractions.

The line between inducing someone to break a law by paying them and "inducing" by reporting the news – which may affect the behavior of readers, subjects of stories, and suppliers of information – is critical. In a criminal law sense, there is a pivotal difference with respect to *mens rea*. But more importantly, it is inconsistent with the First Amendment's guarantee of free speech to permit the government to silence speakers based on the effect of their speech on others, absent truly exigent circumstances. *See, e.g., Cox v. Louisiana*, 379 U.S. at 550-51; *Terminiello*, 337 U.S. at 5; *Brandenburg v. Ohio*, 395 U.S. at 447.[7/] No such exigent circumstances exist

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7/ Petitioners are incorrect that there is no difference between imposing sanctions on those who are actually involved in unlawful interception of conversations and imposing sanctions on innocent third parties. In the former instance, an interceptor sanctioned for revealing taped conversations is being denied the fruits of his criminal conduct – just as bank robbers are justly denied the proceeds of their robberies without triggering any Takings Clause concerns. But punishing speakers for publishing information when they did not engage in any misconduct in acquiring that information, cannot be regarded as anything other than punishment for speech. And a complete ban on that speech, as here, has consistently been recognized as implicating serious First Amendment concerns.

here, and nothing in the text or the purpose of the statute limits its application to exigent circumstances.

The government's assertion that its deterrence interest justifies this statute is as destructive of the First Amendment's guarantee as its assertion of its so-called "pro-speech" interest. Thus, even if the government had been able to support its speculation that punishing innocent third parties will deter unlawful interception by others, that interest cannot justify punishing those who engage solely in speech activities – especially when the speech addresses matters of public concern. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988).

C. Encouraging Use of New Technology

The government certainly cannot rely on its asserted interest in encouraging the use of new technology as sufficient to justify punishing pure speech on matters of public concern. If a government interest in particular technological or commercial developments could justify the government's disregard of its citizens' First Amendment rights, then the government could ban conversation by means of traditional telephones in order to encourage the use of new wireless technology. Or it could ban theater, movies, and books in order to encourage the use of the new internet technologies. Virtually nothing would be left of the fundamental rights preserved to the people by the Constitution. That interest is plainly insufficient to save the application of the statute at issue here.

D. Limiting Additional Harms

Essentially the government's interest here is in protecting people from the embarrassment or other consequences of having those to whom they do not intend to speak candidly learn what they said when speaking with someone to whom

they did. The government's interest in protecting the privacy of its citizens against the intrusion of other citizens is not directly involved here, where the statute is being used to punish speakers who did not participate in any intrusion.[8/]

The potential harms that the government seeks to prevent are similar to the harms the government seeks to prevent when it enacts laws proscribing publication of truthful, but preferably confidential, information – such as the names of juveniles arrested for criminal offenses or the preliminary investigations of judges for alleged misconduct. In those contexts, this Court has held that punishing such speech "requires the highest form of state interest to sustain its validity." *Smith v. Daily Mail Publ'g. Co.*, 443 U.S. 97, 102 (1979). "[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.*

This Court did not find the government's interest in protecting juveniles from such publication sufficient to justify punishing speech even in that specific, considered context. The government has an even weaker interest here, where it has

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8/ This issue also does not involve, as individual petitioners would have it, Bartnicki Br. 30, either the right to be let alone – which is a right to be free from *government* intrusion – or an interest in being free from intrusive *conduct* – which was the concern motivating the regulation upheld in *Hill v. Colorado*, 120 S. Ct. 2480 (2000). *Hill v. Colorado* did not recognize *any* government interest in protecting people from *speech*. To the contrary, the regulation upheld in *Hill v. Colorado* was upheld because it did not prevent protesters from speaking their minds to their intended audience at the times they chose to speak, but was instead a time, manner, place restriction that mandated a limited distance interval between speakers and listeners who wished to avoid closer contact. That decision provides no support for the decision petitioners seek here. Section 2511(1)(c) is a complete ban, not a time, manner, place regulation. It prohibits anyone, however innocent of the interception itself, from conveying any material covered by the statute under any circumstances.

simply legislated a broad proscription of speech without regard to the nature of the information at issue or the likelihood that anyone would actually be harmed by its publication.[9/]

The fact that the source of the information is someone who broke the law in obtaining or divulging it does not, in the absence of misconduct by the publisher, change the calculus, as this Court determined in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). There, the newspaper subjected to punishment for publishing accurate information had not engaged in any misconduct itself, but it knew the source of the information had almost certainly committed a misdemeanor in divulging that information to the newspaper. 435 U.S. at 832. This Court found a constitutionally significant distinction between punishing the speech of someone who illegally acquired the information and punishing the speech of someone who later received and published that information without participating in the illegal acquisition. *Id.* at 837. Assuming for purposes of decision that preserving the confidentiality of this information served the state's interests, the Court ruled that the state's interests were insufficient to justify punishing innocent third parties for publishing accurate information on matters of public concern. *Id.* at 841.

Even in reaching a proper balance between defamation laws – which outlaw false speech that is not itself valued under the First Amendment – and the First Amendment, this Court has drawn a similar line. When the subjects of defamatory speech are, like individual petitioners, involved in a public

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9/ Indeed, private comments on matters of public concern are most likely to embarrass the person who made them only when they suggest that the person's public statements have been consistently false. The government cannot be said to have a strong interest in protecting the ability of those involved in important issues of public policy to lie.

controversy, the speech is punishable only if the speakers have deliberately engaged in defaming someone – *i.e.*, if they publish information as if it were true when they knew it was false or recklessly disregarded evidence that it was. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. at 279-80; *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130 (1967). Similarly, here, where the government is seeking to prevent similar harms – embarrassment and negative social or business ramifications – speakers should only be subject to punishment if they were deliberately involved in the unlawful interception.

If the rule were otherwise, and speakers could be punished for truthful speech on matters of public concern in order to protect people from embarrassment and social or business ramifications – much of current First Amendment doctrine would have to be revised. For example, the accommodation of defamation laws and the First Amendment would be unnecessary because currently non-actionable defamation is just as likely to cause its subjects embarrassment and negative ramifications as actionable defamation. *See, e.g.*, Bartnicki Br. 17 (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511-12 (1991), for its recognition that falsity can injure the subject by indicating a negative trait). Similarly the protections accorded parody would be unnecessary because parody also causes its subjects embarrassment and possible negative ramifications. *Cf. Hustler Magazine v. Falwell*, 485 U.S. at 53-55; *see also NAACP v. Claiborne Hardware*, 458 U.S. at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action").

Governments could also choose to protect their citizens from criticism. At the very least, a right of reply would be justified. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). But so would flat-out censorship. It cannot be doubted that public criticism stings. And the practical

ramifications can be severe: theatrical plays close; candidates are defeated at the polls; businesses lose market share or fail altogether.[10/]

Whether there may be specific types of information about private individuals that are so sensitive, and of so little public concern, that the government's interest in helping citizens shield it from public view would meet the requisite standard is not presented here. This statute broadly sweeps in every possible subject of conversation, including matters of legitimate public concern – such as the school union negotiations discussed in the conversation at issue in this case. And as this Court has long recognized: "Broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *accord Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980).

To permit such blanket prohibitions of speech as a prophylactic in order to safeguard the feelings and positions of the subjects of that speech – regardless of the specific interests at issue and regardless of the speaker's conduct – requires a

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10/ Individual petitioners' attempt to draw a line permitting publication of information that has become public knowledge, Bartnicki Br. 18, not only is without support in the text of the statute itself, it fails to solve the problems of any party. Permitting speakers to discuss information relevant to issues of public importance only when a substantial number of others already know the information still deprives speakers of significant First Amendment rights. And those overheard remain vulnerable to the "magnified harm," Gov. Br. 39, that repetition to a wider audience is said to present. Nor does the suggested line further any of the government's other asserted interests. At the same time, such a line would leave would-be speakers in the dicey position of determining when information is sufficiently public to be "safe." Here, for example, respondent Vopper was far from the first to divulge the contents of individual petitioners' conversation.

drastic transformation of the First Amendment guarantee of free speech. If the Constitution is to continue to protect "free and unhindered debate on matters of public importance," *Pickering*, 391 U.S. at 573, the government's asserted interest in protecting people's feelings and positions must be found insufficient to justify the broad proscription of truthful speech at issue here.

E. Non-Speech Alternatives

Compounding the incursion on First Amendment rights here is the government's utter failure to try or consider non-speech alternatives. The government did not impose a speech ban on innocent third parties after years of attempting to prosecute the miscreants who were actually intercepting private conversations. The government subjected innocent third parties to criminal and civil sanctions from the beginning, without waiting to determine whether a more focused restriction on actual wrongdoers would prove sufficient. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (concluding that the state "had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech").

Second, the government failed to properly consider technological alternatives to safeguard private conversations without muzzling innocent third parties. For example, the government could have required manufacturers to equip communication devices with encryption or other technologies that would render them secure for conversation in the first place. Indeed, simply in response to market demands, manufacturers have all but eliminated the risk of eavesdropping on cellular telephone conversations with now well-established digital technologies. In addition, the government could have outlawed or restricted the sale of equipment used to intercept private conversations in the first place. The government's

election to ban speech instead, without an adequate consideration of the alternatives, is reason alone to invalidate the application of section 2511(1)(c) to innocent third parties. The First Amendment prohibits the government from making censorship its regulation of first resort. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

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October 25, 2000

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Nos. 99-1687 & 99-1728

IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,

Petitioners,

v.

FREDERICK W. VOPPER, *ET AL.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FREDERICK W. VOPPER, *ET AL.*,

Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF REP. JAMES A. McDERMOTT IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern because *someone else* previously obtained that information unlawfully.

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INTEREST OF THE *AMICUS*

Amicus curiae Rep. James A. McDermott has a strong interest in this Court's resolution of this case, both as a litigant in a pending case, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *pet'n for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709), and as a citizen and Congressman concerned with upholding the Constitution.[1] The facts of the *Boehner* lawsuit help to place in perspective the important First Amendment question in this case, and to highlight the importance of affirming the Third Circuit's holding that a person cannot be punished for disclosing truthful information on a matter of public concern because *someone else* previously obtained that information unlawfully.

The *Boehner* lawsuit arises out of the unlawful interception of a December 1996 telephone conversation among Newt Gingrich, then Speaker of the United States House of Representatives, and other top political leaders, including Rep. John A. Boehner, then Chairman of the House Republican Conference. The conversation involved efforts "to limit political fallout" from an ethics investigation into the Speaker's activities, in apparent violation of an agreement between the Speaker and the Ethics Committee. A transcript of the conversation appeared on the front page of *The New York Times* and other newspapers in January 1997. A Florida couple, John and Alice Martin, subsequently pleaded guilty to the unlawful interception, in violation of the federal wiretapping statute, 18 U.S.C. §§ 2511(1)(a), 2511(4)(b)(ii), and were fined $500 each.

Rep. Boehner subsequently brought a lawsuit charging Rep. McDermott with having disclosed to the media the audiotape unlawfully intercepted by the Martins, in violation of 18 U.S.C.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.3.

§§ 2511(1)(c), 2520. The complaint did not allege that Rep. McDermott had been involved in the underlying interception, or had broken the law by receiving the audiotaped conversation from the Martins. The District Court granted Rep. McDermott's motion to dismiss on First Amendment grounds, but a fractured panel of the D.C. Circuit reversed. 191 F.3d 463. Petitioners here rely on the D.C. Circuit's *Boehner* decision, *see, e.g.*, Govt. Br. 37-38; Bartnicki Br. 36-37, and the government acknowledges that the decision is "inconsistent" with the Third Circuit's decision in this case, Govt. Br. in *McDermott v. Boehner*, No. 99-1709, at 10-11 (May 25, 2000). Accordingly, Rep. McDermott urges this Court to affirm the Third Circuit's judgment and to vacate and remand the D.C. Circuit's judgment for further consideration in light of that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an age when the First Amendment has been construed to protect such activities as flag burning and liquor advertising, this case calls for a return to basics. At least since the days of the Alien and Sedition Acts, it has been settled that the First Amendment protects Americans' right to disclose truthful information that they have lawfully obtained on matters of public concern. Thus, this Court has repeatedly subjected prohibitions on such disclosure to strict scrutiny. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-38 (1978).

The statute at issue here is a direct ban on speech: it prohibits the "disclos[ure]" of "information." 18 U.S.C. § 2511(1)(c). Petitioners, however, argue that this ban should be subjected only to intermediate scrutiny. That argument turns First Amendment law upside down. Such relaxed scrutiny is warranted in situations where First Amendment interests are more attenuated, such as restrictions on expressive conduct, or content-neutral restrictions on the time, place, or

manner of speech. In these contexts, the speaker remains free to express the same message in a different manner, or at a different time or place. To uphold a *total ban* on *pure speech* under intermediate scrutiny would mean that precedents designed to address "expressive conduct" and other matters at the "outer ambit" of the First Amendment, *e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion), would now be used to gut the Amendment's core protections. Citizens would be free to burn flags, but not to disclose apparent official misconduct. This is the stuff of political parody, not constitutional law.

Not surprisingly, petitioners invoke a bewildering array of alternative rationales to justify the application of intermediate scrutiny to a direct ban on speech, including the alleged content neutrality, general applicability, and benevolent intentions of the wiretapping statutes. At bottom, petitioners' argument boils down to the proposition that information becomes "tainted" if unlawfully obtained by *anyone*, and that the government is thereafter free to proscribe and punish its disclosure by subsequent recipients unconnected to the illegality until some unspecified future point when the information becomes "common knowledge," and the "taint" dissipates. The concept of "tainted" information, however, is alien to the First Amendment, which may explain why petitioners cannot identify (and neither courts nor private parties could ever determine) when such a "taint" dissipates.

The Third Circuit was therefore correct to hold that the First Amendment protects the disclosure challenged in this case. The Third Circuit erred, however, by subjecting the statute to intermediate rather than strict scrutiny. As explained in this brief, strict scrutiny is warranted here because petitioners seek to punish respondents for disclosing truthful and lawfully obtained information on a matter of public concern. *See infra* Part A. None of the rationales proffered by petitioners justifies the application of intermediate scrutiny. Indeed, petitioners cite *no* case outside of the prison context that applied relaxed

scrutiny to a total ban on pure speech. *See infra* Part B. The even more radical contention advanced by petitioners' *amici*—that First Amendment protections do not apply at all—is every bit as unfounded. The disclosure of information is unquestionably speech, and thus has always been protected under the First Amendment. *See infra* Part C. Accordingly, this Court should affirm the Third Circuit's judgment.

ARGUMENT

THE WIRETAPPING ACTS' PROHIBITIONS ON THE DISCLOSURE OF INFORMATION ARE SUBJECT TO STRICT SCRUTINY.

A. This Court Has Long Held That the First Amendment Allows Punishment for the Disclosure of Truthful and Lawfully Obtained Information on a Matter of Public Concern Only Where Necessary to Satisfy an Interest of the Highest Order.

This Court has long held that "where a person lawfully obtains truthful information about a matter of public significance, . . . [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Butterworth*, 494 U.S. at 632 (internal quotation omitted); *see also Fla. Star*, 491 U.S. at 533; *Daily Mail*, 443 U.S. at 103; *Landmark*, 435 U.S. at 837-38.[2] This is the language of strict scrutiny, which is entirely appropriate in evaluating laws targeted at suppressing the dissemination of truthful information in a free society. As

[2] It is well-settled that the imposition of civil liability for damages, whether pursuant to a statute or the common law, amounts to government-sanctioned punishment for purposes of the First Amendment. *See, e.g., Fla. Star*, 491 U.S. at 540-41; *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *N.Y. York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). That principle applies with particular force where, as here, the plaintiffs do not allege any particularized injury or seek compensatory damages, but rather seek exclusively statutory and punitive damages. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974).

this Court has emphasized, "state action to punish the publication of truthful information seldom can satisfy constitutional standards," especially where the information involves matters of public concern. *Daily Mail*, 443 U.S. at 102; *Fla. Star*, 491 U.S. at 533.

In *Daily Mail*, for example, this Court invalidated a statute making it a crime for a newspaper to disclose the name of any youth charged as a juvenile offender. 443 U.S. at 105. Because the information at issue there was truthful and had been lawfully obtained by the defendant, the Court held, its disclosure could not be punished absent "the highest form of state interest." *Id.* at 102; *see also id.* at 103 ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.").

Florida Star is to the same effect. At issue there was the constitutionality of a Florida statute outlawing the publication of a rape victim's name in any instrument of mass communication. *See* 491 U.S. at 526 & n.1 (citing Fla. Stat. § 794.03). It was "undisputed," the Court noted, that the challenged publication of the victim's name was "accurate." 491 U.S. at 536. In addition, the defendant had lawfully received the information, regardless of whether state law had been violated by the release of that information in the first instance. *See id.* Finally, the Court noted that "[i]t is clear . . . that the news article concerned a matter of public significance," *i.e.*, "the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 537. Under these circumstances, the Court held, the asserted governmental interests in punishing the challenged publication were not sufficiently weighty to justify the "extreme step" of punishing the disclosure of truthful information on a matter of public concern by a person who lawfully obtained that information. *Id.*

That analysis is controlling here because this case (like the *Boehner* case) represents an attempt to impose punishment for the alleged disclosure of (1) truthful information (2) that the defendants lawfully obtained (3) about a matter of public concern. *First*, the relevant information was undisputedly "truthful"; neither petitioners nor Rep. Boehner has ever alleged that the contents of the disputed audiotapes were in any way inaccurate or misleading.

Second, respondents and Rep. McDermott broke no law by receiving and possessing the challenged audiotapes because neither the federal nor the state statutes proscribe the *receipt* or *possession* of unlawfully intercepted communications. *See, e.g., Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring) ("Congress has not prohibited the receipt of information obtained by means of an illegal wiretap").

Third, there is no question that the tapes involve a matter of substantial public concern. The *Bartnicki* tape included a threat to "blow the[] porches off" of school board members' houses in connection with a teachers' pay dispute, while the *Boehner* tape suggested (if not established) that the Speaker of the House of Representatives, the man second in line for the Presidency of the United States, had violated an agreement with the House Ethics Committee not to orchestrate a political response to a forthcoming reprimand. *See Bartnicki v. Vopper*, 200 F.3d 109, 113 (3d Cir.1999); *Boehner*, 191 F.3d at 465. Indeed, neither petitioners nor Rep. Boehner has alleged that the audiotape caused them any injury, and both seek only statutory and punitive (not compensatory) damages. Govt. Br. 8 n.4 (citing J.A. 130); *Boehner v. McDermott*, No. 98-594, 1998 WL 436897, at *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999).

Notwithstanding these points, petitioners seek to distinguish this Court's strict scrutiny cases "on their precise facts," primarily because in those cases, "the newspaper that published the information acquired it by lawful means." Govt. Br. 28-29

(emphasis added); *see also* Bartnicki Br. 25-26.[3] But that is no distinction at all. In those cases, as here, the *defendants* broke no law by obtaining the disputed information, even though *someone else* broke the law by disclosing that information in the first instance. Accordingly, in those cases, as here, the defendants' alleged disclosure of the information is governed by strict scrutiny.

For example, the issue in *Landmark* was whether the defendant newspaper could be punished for disclosing truthful and lawfully obtained information about a judicial disciplinary proceeding that had been unlawfully divulged by someone else. The Virginia Constitution provided that such proceedings must be kept confidential, *see* 435 U.S. at 830 n.1 (citing Va. Const. art. 6 § 10), and a criminal statute implemented that provision by prohibiting the disclosure of information regarding such proceedings "'by any person to anyone except the Commission,'" *id.* (quoting Va. Code § 2.1-37.13). The defendant newspaper nonetheless obtained and published information regarding such a proceeding, knowing that it had been disclosed in violation of that statute. *See id.* at 832.

While reserving judgment on whether participants in the inquiry could constitutionally be punished for the initial disclosure, this Court held that "third persons who are strangers to the inquiry" could not be punished for disclosing such truthful information of public concern. *See id.* at 837-38. Even

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[3] It is worth noting that petitioners do not suggest that a different analysis applies to individual defendants than to media defendants. That tacit concession is wise, as there is no distinction between the First Amendment rights of the media and other citizens. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972). The *Butterworth* Court thus underscored that the relevant analysis is not limited to media defendants, but applies more broadly to any "person" who "'lawfully obtains truthful information about a matter of public significance.'" 494 U.S. at 632 (quoting *Daily Mail*, 443 U.S. at 103, and *Fla. Star*, 491 U.S. at 533); *see also United States v. Aguilar*, 515 U.S. 593, 605 (1995).

though it was a criminal offense for the participants in the proceeding to *disclose* the information, and the newspaper defendant knew the information had been unlawfully disclosed, the Court assumed that the newspaper had lawfully *received* the information. *See id.* at 837 ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."). The *Landmark* Court accordingly applied strict scrutiny to the State's attempt to punish the defendant for disclosing the information.

Similarly, in *Florida Star*, the plaintiff argued that the defendant newspaper did not "lawfully obtain" her name because it was unlawful for the police department to disclose it—just as petitioners here argue that respondents did not "lawfully obtain" the audiotape because it was unlawful for someone else to intercept and disclose the tape to them. *See* 491 U.S. at 536; *see also id.* at 544 (White, J., dissenting) (noting that "Florida law forbids . . . disclosure" by the police). This Court rejected that argument: although the police department apparently broke the law by disclosing the name, the newspaper did not break the law by receiving it. "Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* at 536 (emphasis in original). Any unlawful disclosure by the police department, in other words, did not "taint" the underlying information or otherwise render unlawful its subsequent receipt. *See id.* ("Nor does the fact that the Department apparently failed to fulfill its obligation under [Fla. Stat.] § 794.03 not to 'cause or allow to be . . . published' the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful.").[4] Indeed, the plaintiff in

[4] In light of these statements, the government errs by asserting that *Florida Star* reserved in a footnote the question whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously disclosed (continued...)

Florida Star sued the police department as well as the newspaper for the disclosure, and the department settled that case prior to trial. *See id.* at 528.

The bottom line is that a defendant "lawfully obtains" information that *he* obtains lawfully, regardless of whether *someone else* previously obtained that information unlawfully. Because it is lawful to *receive* information unlawfully *disclosed* by someone else, such information is lawfully obtained by the recipient. Contrary to Judge Ginsburg's assertion in *Boehner*, that commonsense proposition is not "an exercise in empty formalism" in which "[o]nly the most formal minded" would engage." 191 F.3d at 479 & n.**. It is not "empty formalism" but conventional statutory interpretation to conclude that a statute means what it says and says what it means. *See, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). That is particularly true where, as here, the relevant statutes have both civil and criminal application. *See, e.g., United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 & n.10 (1992) (applying rule of lenity in construing statute with both civil and criminal application). Thus, as Rep. Boehner conceded below, "[although] the acquisition of appellant's phone call by the Martins was itself a crime, . . . *Rep. McDermott's receipt of that information was not.*" Br. for

[4] (...continued)
that information unlawfully. *See* Govt. Br. 29 (citing *Fla. Star*, 491 U.S. at 535 n.8). As noted in text, *Florida Star* expressly resolved that question. The footnote cited by the government instead reserved the question whether the person *who unlawfully acquired the information* could be punished for the disclosure as well as the acquisition. *See* 491 U.S. at 535 n.8 (reserving the question whether "government may ever punish not only the unlawful acquisition, but the ensuing publication as well"). That much is apparent not only from the text of the footnote itself, but also from its reference to *Landmark*, where that question was also reserved. *See id.* (citing 435 U.S. at 837, which states that "[w]e are not here concerned with the possible applicability of the [anti-disclosure] statute to one who secures the information by illegal means and thereafter divulges it").

Appellant, D.C. Cir. No. 98-7156, at 31 (Dec. 29, 1998) (emphasis added).[5]

To dismiss this point as "empty formalism" is to ignore the very substantial difference between proscribing the *disclosure* of information by one person and the *receipt* of such information by someone else. Congress knows how to proscribe receipt or possession (as distinct from disclosure or distribution) when it so desires. *See, e.g.*, 18 U.S.C. § 1202(a) (proscribing receipt or possession of ransom money); 26 U.S.C. § 5861(d) (proscribing receipt or possession of unregistered firearm). Unless and until Congress takes the extreme step of proscribing the receipt of information unlawfully obtained or disclosed by someone else, such receipt remains lawful.

Indeed, as Judge Sentelle recognized, if unlawfully intercepted information is "tainted" and hence outside the scope of the First Amendment, there is no basis for limiting the "taint" only to the first person who lawfully receives that information. *See Boehner*, 191 F.3d at 485 (dissenting opinion). Anyone who heard the Bartnicki tape on the radio (or read the front-page *New York Times* story about the audiotaped conversation in *Boehner*) received the challenged information with knowledge or reason to know that it had been unlawfully intercepted in the first instance. But no one would seriously argue that all of these people obtained that

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[5] Rep. Boehner now asserts that his allegation that the Martins told Rep. McDermott that they had been promised immunity for their conduct "'gives rise to an inference that the 'transaction may have involved a *quid pro quo*' and that McDermott is the 'obvious candidate' to have brokered this 'illegal transaction.'" Boehner Br. 2 (quoting *Boehner*, 191 F.3d at 476 (opinion of Randolph, J.)). That assertion, however, has no basis in the complaint, and is in fact contradicted by Rep. Boehner's concession that Rep. McDermott was not complicit in the underlying interception, *see infra* p. 11, and the district court's conclusion (which Rep. Boehner never challenged below) that "[t]he Complaint contains no allegation that [Rep. McDermott] directed the Martins' actions, or that he was otherwise complicit in their crime," or was even "aware of the tape's existence until the Martins dropped it on his doorstep." *Boehner*, 1998 WL 436897, at *3.

information unlawfully. Petitioners' suggestion that the "taint" dissipates when the information becomes "common knowledge," Govt. Br. 44, or "ha[s] been generally made public," Boehner Br. 28 n.9, has no basis in the statute, and provides no workable guidance for private parties or courts.

Contrary to Judge Ginsburg's apparent belief, none of this is to say that unlawfully intercepted information can be "launder[ed]" through third parties who did not participate in the initial interception. 191 F.3d at 480 (internal quotation omitted). The term "laundered" is a loaded one: it suggests complicity between the interceptor and the discloser. It goes without saying that anyone complicit in the underlying interception—regardless of whether that person actually participated in the act of interception—did not lawfully obtain the information. The traditional doctrines of conspiracy and aiding-and-abetting exist to address just this situation. *See, e.g., Liffiton v. Keuker*, 850 F.2d 73, 77 (2d Cir. 1988) (conspiracy to intercept protected communication); *United States v. Newman*, 490 F.2d 139, 142-43 (3d Cir. 1974) (aiding and abetting interception of protected communication). Here, however, it is uncontested that respondents were not complicit in the underlying interception, *see Bartnicki*, 200 F.3d at 115, just as Rep. Boehner's complaint "contains no allegation that [Rep. McDermott] directed the Martins' actions, or that he was otherwise complicit in their crime," *Boehner*, 1998 WL 436897, at *3. Accordingly, there is no basis for attributing the interceptors' culpability to respondents, Rep. McDermott, or any other subsequent recipient of the audiotapes, and thus no basis for departing from strict scrutiny.

Nor is there any basis to petitioners' suggestion that strict scrutiny applies only in cases where the disputed information was "released by the government itself." Govt. Br. 31-32; *see also* Boehner Br. 21-22. To the contrary, the *Daily Mail* Court expressly rejected that suggestion, holding that strict scrutiny applies to all bans on the disclosure of "lawfully obtained" information, and that whether the information was obtained

from government sources "is not controlling." 443 U.S. at 103. First Amendment rights, the *Daily Mail* Court explained, "cannot be made to rely solely on the sufferance of the government to supply . . . information." *Id.* at 104. The Court subsequently reaffirmed that point in *Butterworth*, applying strict scrutiny to an attempt to punish the disclosure of "information of which [a grand jury witness] was in possession before he testified," which was not obtained from the government. 494 U.S. at 632.

Indeed, any attempt to punish the disclosure of truthful and lawfully obtained information regarding matters of public concern—whatever its source—would create the anomaly that truthful speech would receive *less* protection than defamatory speech. Since *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), it has been black-letter law that the First Amendment does not permit punishment even for the publication of *false* and *defamatory* statements with respect to matters of public concern involving public officials or public figures absent a showing of actual malice. That heightened standard of culpability is necessary, this Court has explained, to preserve the vitality of public debate with respect to public officials and matters of public concern. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

The statutory provisions at issue here, however, authorize the imposition of liability for disclosure of intercepted communications based on a lesser *mens rea* requirement—knowledge or reason to know that the disclosed communication was unlawfully intercepted. *See, e.g.*, 18 U.S.C. § 2511(c). The imposition of liability here would thus lead to the anomalous result that a citizen would receive *lesser* protection for publishing truthful and lawfully obtained information about public figures than for publishing false and defamatory statements about them. The First Amendment neither requires nor tolerates any such anomaly. *See Fla. Star*, 491 U.S. at 539 (characterizing this anomaly as "perverse").

B. There Is No Basis for Subjecting the Statutory Provisions at Issue to Intermediate Scrutiny as Applied in These Cases Because They Impose Direct Prohibitions, Not Merely Incidental Restrictions, on Speech.

Notwithstanding the controlling *Butterworth/Florida Star/Daily Mail/Landmark* line of cases, petitioners argue that intermediate scrutiny applies for a host of different reasons. Intermediate scrutiny cannot possibly apply here, however, for the fundamental reason that such scrutiny governs laws that have "only an incidental effect on protected speech"—*not* laws that "directly and immediately" restrict First Amendment rights. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2456-57 (2000). Accordingly, this Court applies intermediate scrutiny to restrictions on expressive conduct and the like, but has never applied such scrutiny to a *complete ban* on *speech itself*. Such bans are at odds with the core protections of the First Amendment, and thus have always been subject to strict scrutiny. *See, e.g., City of Erie*, 120 S. Ct. at 1394 (plurality opinion) (emphasizing that intermediate scrutiny was appropriate because the challenged ordinance "does not effect a 'total ban' on protected expression"); *id.* at 1407 (Stevens, J., dissenting) (dissenting based on contrary view that "the ordinance is a total ban," and emphasizing that the Court had never "approved the use of [the secondary effects doctrine] to justify a total ban on protected First Amendment expression"). In addition to this general point, each of the five rationales advanced by petitioners for applying intermediate scrutiny is either inapplicable or invalid for additional reasons explained below.

1. Cases Addressing Laws of General Applicability Are Inapposite Because the Statutory Provisions at Issue Target and Prohibit Speech Itself.

Since the provisions at issue single out and prohibit the "disclos[ure]" of "information," they can hardly be characterized as general laws that only incidentally affect speech. Nonetheless, petitioners characterize them just so. In particular, they claim that intermediate scrutiny applies because "these statutes do not single out speech for any special prohibition; they proscribe *not only* publication, but any kind of 'use,'" and are thus "'controlled by . . . the . . . well-established line of decisions holding that *generally applicable laws* do not offend the First Amendment simply because their enforcement against the press has *incidental effects* on its ability to gather and report the news.'" Bartnicki Br. 20-21 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)) (emphasis added); Govt. Br. 23-27. This argument is flawed as a matter of statutory construction, constitutional law, and common sense.

Contrary to petitioners' suggestion, the statutes at issue do single out speech. In separate subsections, they separately prohibit three distinct categories of activities—(1) interception, (2) use, *and* (3) *disclosure* of protected communications. *See, e.g.*, 18 U.S.C. § 2511(1)(a, c, d). The linchpin of petitioners' argument is thus the unstated proposition that the express statutory prohibitions on the disclosure of information have no operative effect at all. Instead, petitioners insist, "[t]he statutory bar created by Section 2511(c) [on disclosure] and (d) [on use] is identical in scope and operation to a unitary, undifferentiated prohibition on use." Govt. Br. 24-25. Petitioners are not, however, free to rewrite the challenged provisions in order to defend them. Petitioners may prefer to defend a general prohibition on use rather than a specific prohibition on disclosure, but they may not defend a specific prohibition on disclosure by simply recasting it as a general

prohibition on use. Their attempt to write the specific prohibition on disclosure out of the statute violates the elementary canon that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Moreover, even if the statutes did not specifically target disclosure (and hence speech) as well as use, it would still be impossible to conclude that their application in this case imposes only an "incidental burden" on speech. Intermediate scrutiny is appropriate only with respect to "generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech." *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990). Thus, a law that prohibits the destruction of draft cards can *incidentally* prevent anti-draft expression through the conduct of burning a draft card, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); a law that prohibits camping in public parks can *incidentally* punish social protest through the conduct of camping in public parks, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984); a law that prevents public access to military bases can *incidentally* punish anti-military expression through the conduct of entering a military base, *United States v. Albertini*, 472 U.S. 675, 687-88 (1985); and a law that prohibits public nudity can *incidentally* punish erotic expression through the conduct of nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67, 571 (1991).

Petitioners' attempt to place this lawsuit within that line of cases is misplaced. At issue here is an attempt to prohibit speech, not expressive conduct. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating *the nonspeech element* can justify *incidental* limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376 (emphasis added). The only governmental interest here is an interest in prohibiting the disclosure of information—an interest that clearly relates to speech rather than nonspeech

conduct. As the *O'Brien* Court explained, a statute "aimed at suppressing communication could not be sustained as a regulation of noncommunicative conduct." *Id.* at 382 (citing cases); *see also United States v. Eichman,* 496 U.S. 310, 313-14 (1990) (subjecting statute proscribing flag-burning to strict scrutiny where the governmental interests involved related to the speech element of expressive conduct); *Arcara v. Cloud Books*, 478 U.S. 697, 706 n.3 (1986) ("[W]e have previously struck down generally applicable statutes that purport to regulate nonspeech" where "the 'nonspeech' which drew sanction was intimately related to expressive conduct protected under the First Amendment.") (citing cases; internal quotation omitted). Any attempt to punish the disclosure of information "imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." *Cox Broad'ing Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (citing *O'Brien*, 391 U.S. at 376-77).

Although this Court has thus repeatedly limited intermediate scrutiny to limitations on nonspeech conduct, as opposed to speech itself, the government (though not Bartnicki) nonetheless claims the opposite: that "the Court has extended th[e] intermediate scrutiny standard to particular First Amendment settings that involve the regulation of 'pure speech,'" as opposed to nonspeech conduct. Govt. Br. 19. But other than cases regarding *incidental restrictions* (as opposed to bans) on speech, the government cites only *Procunier v. Martinez*, 416 U.S. 396 (1974). That case, which predated *Eichman*, *Arcara*, and *Cox Broadcasting*, addressed "the appropriate standard of review for *prison* regulations restricting freedom of speech," in light of the federal courts' "broad hands-off attitude toward problems of prison administration." *Id.* at 404, 406 (emphasis added). Needless to say, the speech rights of free citizens are not limited to the speech rights of prisoners. And even in this obviously inapposite context, this Court has limited and overruled *Martinez* in part for applying

the wrong standard of review. *See Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

Petitioners fare no better in their attempt to analogize this case to *Cohen*. *See* Govt. Br. 26; Bartnicki Br. 21. That case held only that the First Amendment does not give the media any special exemption from general laws that do not target speech, and thus newspapers are not exempt from the general law of promissory estoppel. *See* 501 U.S. at 669-70. It did not involve a law that directly prohibited the disclosure of information, nor did it hold or suggest that such laws are subject to intermediate rather than strict scrutiny. Instead, *Cohen* merely held the First Amendment inapplicable because under promissory estoppel law (unlike under the wiretapping acts), "any restrictions that may be placed on the publication of truthful information are self-imposed." *Id.* at 671.

2. Cases Addressing Content-Neutral Laws Are Inapposite Because Content-Neutral Laws Are Not Invariably Subject to Intermediate Scrutiny.

Whether or not the wiretapping acts are content-neutral is ultimately irrelevant because the First Amendment protects against not only content-specific restrictions on speech, but also other vices, including flat prohibitions on speech. Nonetheless, petitioners argue that the direct statutory prohibitions on disclosure here are subject to intermediate scrutiny because they are content-neutral. *See* Govt. Br. 21-23; Bartnicki Br. 20-22. Indeed, petitioner Bartnicki purports to quote *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994), for the proposition that the dispositive question is "'whether a particular regulation is content-based [and hence subject to strict scrutiny] or content neutral [and subject only to intermediate scrutiny] . . . .'" Bartnicki Br. 20 (brackets in original). The problem with this "quotation" is that Bartnicki added the inaccurate material within the brackets. While it is true that content-based laws are invariably subject to strict

scrutiny, it is not true that content-neutral laws are invariably subject to intermediate scrutiny.

Rather, *Turner Broadcasting* holds that "the intermediate level of scrutiny [is] applicable to content-neutral restrictions *that impose an incidental burden* on speech." 512 U.S. at 662 (emphasis added). The Court has thus applied intermediate scrutiny to content-neutral limitations on the time, place, or manner of speech, *see, e.g., Hill v. Colo.*, 120 S. Ct. 2480, 2491-94 (2000), and to other incidental burdens, such as requirements that cable television operators make channels available to the public, *see Turner*, 512 U.S. at 643-44. But, as noted above, petitioners cite no case in which this Court applied such scrutiny to flat bans on speech itself outside of the prison context.

The reason for this lack of symmetry is straightforward: content discrimination is not the only vice addressed by the First Amendment. Just as "'[g]overnment action that stifles speech on account of its message'" calls for strict scrutiny, *Turner*, 512 U.S. at 641, so too does government action that stifles speech altogether. "To ensure the widest possible dissemination of information, and the unfettered interchange of ideas, the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994) (internal quotation omitted); *see also 44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 501 (1996) (plurality opinion) ("[C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information.") (internal citation omitted). The most sweeping and absolute bans on speech may be content-neutral, but that hardly insulates them from searching First Amendment review.

Thus, in *Butterworth* this Court applied strict scrutiny to invalidate a statute that prohibited grand jury witnesses from

disclosing their testimony (whatever its content) before that body. *See* 494 U.S. at 626, 632. Although the law was content-neutral, this Court invoked the general rule that "where a person lawfully obtains truthful information about a matter of public significance, we have held that state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 632 (internal quotations omitted).

3. The Means by Which Information Was Attained Is Irrelevant to the Proper Level of Scrutiny Because the Question is Whether the Acts Impose an Incidental Burden or a Flat Prohibition on Speech, Not How the Information Was Obtained.

As explained above, intermediate scrutiny applies to *incidental* restrictions on speech because such restrictions do not prevent speech altogether. Bartnicki nonetheless claims that "[t]his Court's decisions make it plain that a law which prohibits disclosure of material . . . because of the manner in which the material was obtained, is not subject to strict scrutiny." Bartnicki Br. 22. This Court has never said any such thing. *None* of the cases cited by Bartnicki even apply intermediate scrutiny.

Instead, those cases stand for various, inapposite propositions. As explained in greater detail below, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), is merely one of many cases holding that *no* First Amendment scrutiny applies to the disclosure of information obtained pursuant to a concomitant duty of confidentiality, such as information a litigant obtains under a protective order in civil discovery. *See infra* Part C.2.

The copyright cases likewise hold that "[c]opyright laws are not restrictions on freedom of speech" subject to *any* First Amendment scrutiny because—unlike the wiretapping acts—they prohibit only the copying of the specific form of

"expression," not the disclosure of the underlying "facts or ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 547 (1985); *see also id.* at 556 ("No author may copyright his ideas or the facts he narrates."); *id.* ("Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed.") (internal quotation omitted); *Zacchini v. Scripps-Howard Broad'ing Co.*, 433 U.S. 562, 574 (1977) (holding that the First Amendment protects "the reporting of events" but not "an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid"). Rep. Boehner thus errs by insisting that the copyright cases are "on all fours with the instant case," because "[l]ike the copyright laws, the Act does not limit the disclosure of any 'facts' or 'ideas,' just the content of the phone calls themselves." Boehner Br. 9-10. It is precisely because the wiretapping acts prohibit disclosure of the "content" of the communications that, unlike the copyright laws, they *do* limit the disclosure of "facts."

In any event, neither of these sets of cases holds that "a law which prohibits disclosure of material . . . because of the manner in which the material was obtained, is not subject to strict scrutiny," as Bartnicki asserts. Bartnicki Br. 22. Nor does either set of cases even address the level of scrutiny that applies to a ban on the disclosure of information that was not obtained under a concomitant duty of confidentiality. And neither set of cases even applies intermediate scrutiny.

4. Intermediate Scrutiny Does Not Apply Whenever the Government Can Identify a Legitimate Governmental Interest Unrelated to the Suppression of Speech Because the First Amendment Exists Precisely in Order to Elevate Speech Interests Above Other Interests.

The whole point of the First Amendment, of course, is to prevent the government from restricting speech to advance other interests. Nonetheless, the government outflanks

Bartnicki's manner-of-acquisition argument by advancing the even bolder claim that intermediate scrutiny should apply *whenever* Congress acted for a supposedly benevolent purpose. In particular, the government argues that intermediate scrutiny should apply whenever "the law is not hostile to a particular message and does not seek to curtail the communicative impact of the expression." Govt. Br. 19; *see also, e.g., id.* at 11 ("Where, as here, a generally applicable law burdens speech not for the purpose of excising ideas or information from public or private debate, but instead to promote legitimate regulatory aims unrelated to the communicative impact of the regulated activity, the Court applies at most an intermediate level of scrutiny.").

It is not the law, however, that the government can defeat the application of strict scrutiny by simply articulating some statutory purpose unrelated to the suppression of free speech. The government cites no case for that breathtakingly broad proposition, and for good reason: it would be the rare statute that could not be justified by some such purpose. In *Daily Mail*, the government undoubtedly had a legitimate interest in protecting the privacy of juvenile delinquents. 443 U.S. at 104. In *Florida Star*, the government undoubtedly had a legitimate interest in protecting the privacy of rape victims. 491 U.S. at 537. In *Landmark*, the government undoubtedly had a legitimate interest in protecting the reputations of judges. 435 U.S. at 841. And in *Butterworth*, the government undoubtedly had a legitimate interest in protecting the privacy of grand jury proceedings. 494 U.S. at 629-30. In none of these cases, however, did the existence of these interests preclude the application of strict scrutiny altogether; rather, in all of these cases, the Court assessed these governmental interests in the course of the strict scrutiny analysis. Especially given the public importance of the communications at issue, the *Bartnicki* and *Boehner* cases hardly warrant different treatment.

5. Intermediate Scrutiny Does Not Apply Whenever "Constitutionally Protected Interests Lie On Both Sides of the Legal Equation" for the Same Reasons that it Does Not Apply Whenever Legitimate Governmental Interests Lie on Both Sides of the Legal Equation.

Just as all countervailing governmental interests can be considered in the course of strict scrutiny analysis, so too can countervailing constitutional interests, including First Amendment interests. The government nonetheless contends that intermediate scrutiny should apply because "'constitutionally protected interests lie on both sides of the legal equation.'" Govt. Br. 27 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring)). But to note that there are speech interests on both sides of the equation is simply to pose the issue in this case, not to resolve it.

Unlike *Nixon*, this case involves a flat ban on speech. Contrary to the government's contention, this Court has always subjected such bans to strict scrutiny, even where they are defended as necessary to promote "constitutionally protected interests" in free speech or privacy. In *Landmark*, for example, this Court applied strict scrutiny to invalidate a prohibition on the disclosure of information involving confidential judicial disciplinary proceedings, notwithstanding the undisputed state interest in fostering free and open discussion in those proceedings. *See* 435 U.S. at 840-41. Indeed, the government's argument that it may ban speech in order to protect speech is nothing short of Orwellian: the First Amendment does not allow the government to silence one speaker in the name of enhancing the speech of others.

C. There Is No Basis for the Argument Advanced by Petitioners' *Amici* that Respondents' and Rep. McDermott's Disclosures Lie Outside of the First Amendment Altogether.

1. The Argument that Respondents and Rep. McDermott Did Not Engage in Speech is Wrong Because the Disclosure of Information Has Always Been Held To Be Speech.

Apparently recognizing that there is no basis for applying intermediate scrutiny, petitioners' *amici* take a different tack: they argue that disclosure of the contents of an audiotaped conversation is not protected speech at all, and thus is not entitled to *any* protection under the First Amendment. *See* Boehner Br. 3-4; Cell. Telecomms. Ind. Ass'n Br. 9-11. Rep. Boehner argues, for example, that "while the parties will debate the appropriate level of scrutiny to be applied in this challenge to the Act's constitutionality, the essential point is that there is *no* First Amendment right to distribute someone else's pilfered speech." Boehner Br. 3 (emphasis added). He goes on to explain that his argument is premised on the notion that there is no "First Amendment right to publicly disclose *someone else's stolen private speech* that is even roughly analogous to the right to engage in one's *own* speech." *Id.* at 4 (emphasis added).

The premise of this argument—that respondents only disclosed "someone else's speech," and did not speak themselves—is manifestly incorrect. Indeed, this is merely a repackaging of the argument, advanced by Judge Randolph in his *Boehner* opinion, that the *Boehner* case is not about speech at all, but rather about Rep. McDermott's alleged "conduct in delivering the tape." *Boehner*, 191 F.3d at 467. According to Judge Randolph, Rep. McDermott did not "exercis[e] his freedom of speech when he gave copies of th[e] tape to the newspapers" because the speech on the tape "is not McDermott's." *Id.* at 466-67.

It is bedrock First Amendment law, however, that the dissemination of other people's speech is itself speech. That is why booksellers and pamphleteers have First Amendment rights even though they did not write the books or pamphlets. *See, e.g., Marcus v. Search Warrants,* 367 U.S. 717, 729-31 (1961); *Schneider v. N.J.*, 308 U.S. 147, 160-62 (1939). If a merchant engages in protected speech, not unprotected conduct, by selling a book (or an audiotape or videotape), it necessarily follows that respondents and Rep. McDermott engaged in protected speech, not unprotected conduct, by allegedly disclosing the disputed audiotapes. Needless to say, a book on tape is just as entitled to protection as a book on paper, and it does not matter who wrote the book or whose voice is on the tape.

Indeed, by their express terms, the wiretapping acts prohibit the disclosure of information: they penalize anyone who "intentionally *discloses* . . . to any other person the *contents* of any wire, oral, or electronic communication, knowing or having reason to know that the *information* was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." *E.g.*, 18 U.S.C. § 2511(1)(c) (emphasis added). This is necessarily speech, not conduct: petitioners and Rep. Boehner did not sue for the mere act of passing out a tape, but instead for the alleged "disclosure" of "information." As Judge Sentelle emphasized in his *Boehner* dissent, "[w]hat made [Rep. McDermott's] conduct punishable under the statute was the information communicated on the tapes. He could have provided the two newspapers with all the tapes in Washington on a given day and incurred no liability but for the speech contained on the tapes." 191 F.3d at 484. "If the act[] of 'disclosing'. . . information do[es] not constitute speech, it is hard to imagine what does fall within that category . . . ." *Bartnicki*, 200 F.3d at 120. Notwithstanding Rep. Boehner's rhetorical flourishes both this case and the *Boehner* case are about speech, not stolen property. *Cf. Dowling v. United States*, 473 U.S. 207, 216 (1985).

Of course, all speech necessarily entails some incidental conduct, such as moving one's lips, hitting keys on a computer keyboard, or distributing a pamphlet, book, audiotape, or videotape. But a statutory prohibition on speech is not transformed into a statutory prohibition on conduct simply because a particular instance of speech involves some conduct. "[A]lthough it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment." *Bartnicki*, 200 F.3d at 120. Indeed, Judge Randolph himself suggested that a different result might obtain "if, for instance, McDermott violated § 2511(1)(c) by reading a transcript of the tape in a news conference." *Boehner*, 191 F.3d at 467. But there is no constitutionally significant difference between disclosing information by moving one's lips and disclosing that same information by handing over an audiotape. The disclosure of information is still speech, regardless of the *manner* in which it is disclosed.

2. The Argument that the Government May Impose Duties of Confidentiality At Will Is Wrong as Long as There Is a First Amendment.

Finally, and most radically, Rep. Boehner argues that the government is free to prohibit the disclosure of information at will by merely imposing a "duty of nondisclosure." *See* Boehner Br. 22. According to Rep. Boehner, "even assuming the tapes in these cases were 'lawfully obtained' . . ., the Act may nonetheless impose a duty of nondisclosure on all those who receive the tapes." *Id.* He goes on to assert that "[s]uch a duty of nondisclosure would be fully constitutional because, as in *Seattle Times*, the defendant's access to the tape was a 'matter of legislative grace,' since Congress 'granted' access by refraining from penalizing receipt, thus allowing the information to be 'lawfully obtained.'" *Id.*

Needless to say, that is not and cannot be the law. The cases cited by Rep. Boehner stand for the proposition that the

government can punish the disclosure of truthful and lawfully obtained information by persons who obtained that information pursuant to a concomitant duty of confidentiality, such as sensitive information obtained by a federal employee in the course of his employment, *see, e.g., United States v. Aguilar,* 515 U.S. 593, 605-06 (1995), or by a litigant in the course of civil discovery, *see, e.g., Seattle Times*, 467 U.S. at 37. But the government cannot, except in extraordinary cases that satisfy strict scrutiny, punish the disclosure of truthful and lawfully obtained information by persons who did not assume and then breach such a duty. *See, e.g., Aguilar*, 515 U.S. at 606 (distinguishing the *Florida Star* line of cases on the ground that they do not apply "[a]s to one who voluntarily assumed a duty of confidentiality"); *Butterworth,* 494 U.S. at 631-32 (distinguishing *Seattle Times* on this ground). Indeed, that is the very point of the *Butterworth/Florida Star/Daily Mail* line of cases. Rep. Boehner's assertion that Americans receive information "as a matter of legislative grace" whenever the government is kind enough to "refrain[] from penalizing receipt," Boehner Br. 22, has no place in a free society.

Nor does it make any difference whether the defendant is a "public official." Although Rep. Boehner would use *Aguilar* to construct a "public official" exception to the First Amendment, *see id.* at 28-30, neither that case nor any other supports such an exception. Indeed, this point makes no sense: Rep. Boehner begins by invoking his privacy interests, but ends by claiming that the communication addressed such "important matters of state" that it is protected under the Speech or Debate Clause of the United States Constitution. *Id.* at 6. If anything, the fact that the communication in *Boehner* involves the public acts of public officials only underscores the First Amendment problems with attempting to punish its disclosure. *See supra* p. 6.

As noted above, *Aguilar* merely held that the defendant there, a federal judge, could be punished for the disclosure of information he had obtained pursuant to a concomitant duty of

confidentiality. *See* 515 U.S. at 605-06. Unlike Judge Aguilar, Rep. McDermott breached no such duty here. Election to Congress and service on the Ethics Committee entail no general duty of confidentiality. To the contrary, Members of Congress (unlike judges) routinely receive information from sources of all kinds and disclose it to their constituents and the media. Significantly, the audiotape at issue here was not official material obtained pursuant to a duty of confidentiality. Instead, it was allegedly received from private citizens, the Martins. Thus, Rep. Boehner's argument that Rep. McDermott obtained the tape pursuant to a concomitant duty of nondisclosure relating to his position as a Member of Congress is groundless.

CONCLUSION

For the foregoing reasons, this Court should affirm the Third Circuit's judgment, and vacate and remand the *Boehner* case for reconsideration in light of that disposition.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 2000

GLORIA BARTNICKI, *et al.*,

Petitioners,

—v.—

FREDERICK W. VOPPER, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FREDERICK W. VOPPER, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding eighty years ago, the ACLU has supported the right of the press to publish free from government interference and has appeared before this Court on numerous occasions to defend that right. The ACLU has also long advocated in favor of privacy rights, including the right to engage in confidential telephone conversations. Because both rights are at issue in this case, the proper resolution of this controversy is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

From 1992 to 1994, the Wyoming Valley West School District was involved in contentious contract negotiations with the local teachers' union. The chief negotiator for the union was Gloria Bartnicki, and the local union's president was Anthony Kane.

On May 13, 1993, Bartnicki and Kane had a cellular telephone conversation about the salary gap between the union's contract proposal and the offer by the school board. During the course of the conversation, Kane told Bartnicki:

> If they're not going to move for three percent,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

> we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, "we'll meet and discuss this." You don't discuss the items in public.

Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999).

An unknown person intercepted and recorded the call between Bartnicki and Kane. Shortly thereafter, a tape of the conversation was anonymously dropped in the mailbox of Jack Yokum, the head of a local taxpayers' association formed solely to oppose the bargaining demands of the teachers' union. Yokum listened to the tape and, recognizing Bartnicki and Kane's voices, turned over copies of the tape to at least one local radio station, WILK Radio. A talk show host on that station, Frederick W. Vopper, played part of the tape repeatedly on his radio news/public affairs talk show, which was broadcast simultaneously over WILK Radio and WGBI Radio.

Following these broadcasts, Bartnicki and Kane sued Yokum, Vopper, WILK Radio, and WGBI Radio under both federal and state law in the United States District Court for the Middle District of Pennsylvania.[2] They based their federal claim on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510 *et seq*. Title III, the principal federal wiretapping statute, prohibits the illegal interception of wire, oral, or electronic communications. *See* 18 U.S.C. §2511(1)(a). In addition, the statute makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of [Title III]." 18 U.S.C. §2511(1)(c).

[2] Throughout this brief, *amici* will refer to Vopper, the radio stations, and Yokum collectively as either the "media defendants" or "the press."

Bartnicki, Kane, and the media defendants all eventually moved for summary judgment. The district court denied the cross-motions and, in doing so, held that the application of Title III to the defendants' actions would not violate the First Amendment. The district court did, however, subsequently certify the First Amendment question for interlocutory appeal.

On interlocutory appeal by the defendants, the Third Circuit reversed. *See Bartnicki*, 200 F.3d at 129. At issue, the court stated, was "whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants . . . played no direct or indirect role in the interception." *Id.* at 112. In order to answer this question, the court first determined that, despite what it considered to be a plausible argument that Title III should be subject to strict scrutiny, intermediate scrutiny was appropriate. The court then held that Title III failed intermediate scrutiny. Dissenting, Judge Pollak agreed with the majority's application of intermediate scrutiny but disagreed with its application of that standard. *See id.* at 129-36. In his view, Title III's nondisclosure provision advanced the government's interest in protecting privacy in a manner sufficiently tailored to survive intermediate scrutiny.

SUMMARY OF ARGUMENT

The central issue in this case is one that the Court has confronted on several occasions: May the government, in order to protect privacy or confidentiality, punish the press for publishing truthful, newsworthy information that the press has lawfully obtained? In the past, the Court has regarded such efforts to limit the press's right to publish with great skepticism, and has consistently invalidated them. While the petitioners today invite the Court to adopt a novel approach that would undermine the Court's traditional press protections, *amici* urge the Court to continue to read the First Amendment as it has before. The value of personal privacy must not be slighted, but the restriction on speech at issue in this case is an inappropriate means of protecting the undeniably important privacy interest at stake.

For two reasons, the Court should evaluate the application of Title III to the media defendants under strict scrutiny. First, strict scrutiny is appropriate because Title III's application in this case would impinge upon the editorial autonomy of the media by prohibiting the press from publishing truthful, newsworthy information. The preservation of editorial autonomy has been a cornerstone of the Court's First Amendment jurisprudence. Accordingly, the Court has stated on several occasions that the government may restrict the press's editorial judgments about what to publish, if at all, only when the government demonstrates that the restriction is necessary to further a state interest of the highest order. On the facts of this case, Title III's application would represent a substantial restriction on the press's freedom to publish as it sees fit. Strict scrutiny should therefore apply.

Strict scrutiny should also be applied to Title III's application in this case because the statute's disclosure prohibition is a content-based restriction on speech by the media. Like most regulations the Court has considered content

based, Title III's disclosure provision expressly conditions liability on the content of speech. Furthermore, the provision's restraint on speech is principally justified on the basis of a concern that is directly tied to content. In this case, specifically, one of plaintiffs' principal claims is that the public disclosure of plaintiffs' confidential conversation revealed information that was intended to be private. Under this Court's precedents, a statute that focuses so clearly on the communicative impact of the media's speech is content based.

On these facts, moreover, Title III's application cannot survive strict scrutiny. *Amici* readily acknowledge the government's compelling interest in preserving the privacy of confidential communications. The government, however, has failed to meet its burden of demonstrating the inadequacy of less restrictive alternatives to accomplish that goal including, most obviously, more vigorous enforcement of the prohibition against illegal wiretaps that is already a part of Title III. The increasing availability of technological solutions to the problem of wireless security is also relevant in this case, as it has been in several of the Court's other recent cases. In short, petitioners have failed to show that the use of Title III against the media defendants is either necessary or appropriate.

ARGUMENT

I. STRICT SCRUTINY IS THE APPROPRIATE CONSTITUTIONAL STANDARD TO APPLY IN THIS CASE

"There is little need to reiterate that the freedoms of speech and press rank among our most cherished liberties." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973). Nevertheless, not all regulations affecting speech or press are subject to the same

scrutiny by the Court. Accordingly, the Court must first determine what level of scrutiny is appropriate to review the application of Title III to the facts of this case. Because, on these facts, Title III's disclosure prohibition impermissibly interferes with the editorial autonomy of the press, the use of Title III against the press in this case should be subject to the most exacting scrutiny. Moreover, because the application of Title III against the press in this case proscribes speech based on its direct communicative impact, the disclosure prohibition falls squarely within the Court's well-established definition of content-based speech regulations, which are subject to strict scrutiny.

A. On The Facts Of This Case, Title III's Disclosure Prohibition Intrudes Upon The Editorial Autonomy Of The Press

An independent press is essential to the viability of our democratic system of government. The free press's central importance stems from two features of American politics: the "fundamental principle of our constitutional system" that the responsiveness of government to the people depends crucially on sustaining an "uninhibited, robust, and wide-open" debate on issues of public significance, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966); and the oft-acknowledged fact that the press has historically played, and must continue to play, an essential role in furthering that debate. *See, e.g., id.* at 219 ("[T]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs"). As the Court recognized in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), "[t]he newspapers, magazines, and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and . . . informed public

opinion is one of the most potent of all restraints upon misgovernment." *Id.* at 250.

Because the legitimacy of our political institutions depends to a large extent on the existence of a free press, the Court has repeatedly concluded that the First Amendment's Speech and Press Clauses were designed to safeguard the press's independence from government intrusion. Editorial autonomy lies at the core of that independence and, for that reason, the Court has consistently rebuffed government attempts to limit the press's freedom to make editorial judgments. Whether the restrictions on editorial autonomy have taken the form of financial restraints on certain publications, *see Grosjean*, 297 U.S. at 249-50; restrictions against the publication of truthful, newsworthy information that the press acquired lawfully, *see, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 530-40 (1989); *Mills*, 384 U.S. at 218-19; or requirements that the press publish information against its will, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), the Court has concluded that the restrictions were inconsistent with the "preserv[ation] [of] an untrammeled press as a vital source of public information." *Grosjean*, 397 U.S. at 250. The tradition against restraints on editorial independence is thus well-established.

In rejecting restrictions on editorial autonomy, the Court has emphasized that any government intrusion into the press's editorial process will almost certainly be invalidated.[3] For example, in *Miami Herald*, the Court consid-

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[3] As the language quoted below makes clear, both *Miami Herald* and *Mills* indicate that there may not be *any* circumstances under which government interference with editorial autonomy is permissible. That observation, of course, suggests adopting a *per se* rule of invalidity for government actions that interfere with the independence of editorial judgments. In fact, Justice Kennedy has urged the adoption of such a

(continued...)

ered the constitutionality of a "right of reply" statute that required any newspaper publishing an editorial criticizing a candidate to print the candidate's reply to the criticism. *See* 418 U.S. at 244. Concluding that the statute "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors," the Court held:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258 (footnote omitted). Likewise, the Court held in *Mills* "that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment" when that law impinges on the editorial judgment of the press by prohibiting the press from publishing certain editorials on an election day. 384 U.S. at 220.

The Court's firm protection of editorial autonomy is highlighted by a string of cases which have presented, in different contexts, "the conflict between truthful reporting and state protected privacy interests." *Florida Star*, 491 U.S. at 530. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court found unconstitutional a civil damage award against a television station for broadcasting the name of a rape victim in violation of a law that prohibited the publication of the victim's name. In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the Court vacated as unconstitutional a pretrial order enjoining a newspaper from publishing the name or picture of an eleven-year-old boy on trial for second-degree murder. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court held that Virginia could not constitutionally punish a newspaper for publishing truthful information regarding confidential proceedings of the state's Judicial Inquiry and Review Commission. In *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97 (1979), the Court ruled unconstitutional a West Virginia statute that made it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of a child charged as a juvenile offender. Finally, in *Florida Star*, 491 U.S. at 530-41, the Court held that the First Amendment did not permit Florida to punish a newspaper for publishing the name of a rape victim that the paper had obtained from a police report.

In each of these cases, the Court's skepticism about regulations that restrict editorial independence drove its careful scrutiny of the restrictions at issue. The Court stressed the value of "protect[ing] the freedom of the press to report and criticize" as it sees fit, *Landmark*, 435 U.S. at 840, and the constitutional importance of "rel[ying] . . . upon the judgment of those who decide what to publish or broadcast." *Cox*, 420 U.S. at 496 (citing *Miami Herald*). Because of

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[3] (...continued)
rule on at least one occasion, *see Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991)(Kennedy, J., concurring in the judgment)(arguing that when a regulation imposes "restrictions on authors and publishers, using as its sole criterion the content of what is written," the regulation is *per se* invalid, and it is "both unnecessary and incorrect to ask whether the State can show that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end" (internal quotation marks omitted)), and the Court has elsewhere leaned towards the application of a *per se* rule in a similar context, *see Miami Herald*, 418 U.S. at 256 ("The clear implication [of our previous cases] has been that *any* such compulsion to publish that which reason tells [the press] should not be published is unconstitutional" (emphasis added)(internal quotation marks omitted)).

the magnitude of these interests, the Court made clear, even in the earliest cases discussing the issue, "that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Daily Mail*, 442 U.S. at 102 (discussing *Landmark* and *Cox*). Building on these decisions, *Florida Star* and *Daily Mail* emphasized that editorial judgments about what to publish may be overturned, if at all, only under very limited circumstances: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Daily Mail*, 442 U.S. at 103; *Florida Star*, 491 U.S. at 533. In short, strict scrutiny applies.

In the few instances in which the Court has upheld restrictions on what the press may publish, it has taken great pains to emphasize that those restrictions did not undermine the traditional protection that the First Amendment provides to editorial autonomy. For example, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, the Court upheld the power of the government to prohibit discriminatory classified advertisements. The Court carefully circumscribed its holding, however, making clear that its decision rested on the fact that the newspaper's actions involved only commercial speech -- which, because the case was decided prior to *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), was largely unprotected by the First Amendment. Moreover, in setting forth its holding, the Court "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views on [issues], however controversial." *Pittsburgh Press*, 413 U.S. at 391; *see also Miami Herald*, 418 U.S. at 255 (reaffirming the narrowness of the holding in *Pittsburgh Press*).

The Court's decisions in *Cohen v. Cowles Media Co.*,

501 U.S. 663 (1991), and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), present similarly limited holdings. In *Cowles Media*, the Court upheld the application of promissory estoppel to enforce a pledge of confidentiality given by a reporter to a news source in exchange for information. The Court pointed out that, far from undermining editorial autonomy, its ruling simply enforced the newspaper's voluntary editorial judgment to enter into the agreement and restrict its own authority to publish the source's name. *See Cowles Media*, 501 U.S. at 670-71. And, in *Seattle Times*, where the Court upheld a protective order prohibiting the defendant newspaper from publishing information that it acquired through discovery, the Court stressed that the protective order regulated the press only in its capacity as a party-litigant. Because the newspaper obtained the information by virtue of its position as a party-litigant, the Court concluded, the trial court could condition the release of the information to the paper on the paper's agreeing to limitations on its use. *See Seattle Times*, 467 U.S. at 32.[4]

In our view, the Court's strong presumption of invalidity in cases like *Miami Herald* and *Mills*, combined with its clear application of strict scrutiny in *Florida Star* and *Daily Mail*, demonstrates that similar restrictions on the editorial autonomy of the press may be upheld only if they serve a

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[4] In other cases involving regulations affecting the press, the Court has similarly emphasized the absence of any impingement on editorial independence. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)(stressing that a judgment requiring reporters to testify before a grand jury "involve[s] no intrusion[] upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold"); *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)(noting that application of the Sherman Antitrust Act to the press did not "interfere[] with freedom to print as and how one's reason or one's interest dictates" (internal quotation marks omitted)).

compelling government purpose and are narrowly tailored to further that interest. The application of Title III in the present case presents just such a restriction: the press lawfully obtained truthful information about a matter of public significance, and the enforcement of Title III in this case will punish publication of that information.

The fact that an unknown third party violated the wiretap provisions in order to provide the press with the information at issue in this case does not, as petitioners suggest, reduce the relevance of the earlier cases involving editorial autonomy. Similar violations by third parties apparently occurred in two of those earlier cases, which refutes any suggestions that the present case is unique. In *Landmark*, the press acquired information regarding a judicial inquiry only by virtue of the fact that a participant to that proceeding had violated a state statute prohibiting participants from disclosing information related to the proceeding. *See Landmark*, 435 U.S. at 830 n.1, 832. Similarly, in *Florida Star*, the Court explicitly acknowledged that the press had obtained the information at issue only because a third party -- in that case a Florida Police Department -- had violated a state statute. *See Florida Star*, 491 U.S. at 536. Despite these violations, the Court concluded in both cases that the press had lawfully acquired the information at issue. *See id.* at 536; *Landmark*, 435 U.S. at 837. And, in both cases, the conduct of the third parties was irrelevant to the Court's analysis.[5]

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[5] In a footnote in *Florida Star*, the Court stated that it was not "settl[ing] the issue whether, in cases where information has been acquired *unlawfully* by a newspaper, or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 534 n.8 (emphasis in original). Petitioners contend that this footnote renders *Cox*, *Landmark*, *Daily Mail*, and *Florida Star* irrelevant to any case in which a party responsible for the press's acquisition of information engaged in unlawful activity. In light of the fact that there (continued...)

Nor does the third party's illegal conduct in the present case undermine the reasons supporting the application of strict scrutiny to laws impinging on editorial autonomy. In the case law discussed above, it was the value of editorial independence -- the interest in protecting the press's right to "decide what to publish or broadcast" -- that led the Court to apply strict scrutiny. *Cox*, 420 U.S. at 496. This value does not suddenly shrink in importance when a competing interest -- such as the state's obviously important interest in protecting against illegal breaches of privacy -- is also at stake. Because the value driving the application of strict scrutiny in prior cases remains undiminished in the present case, the application of Title III to the media defendants in this case should be strictly scrutinized. *See Florida Star*, 491 U.S. at 530 (acknowledging "[t]he tension between the right which the First Amendment accords to a free press . . . and the protections . . . accord[ed] to personal privacy against the publication of truthful information," but concluding that strict scrutiny provides the appropriate mechanism for evaluating that tension). This conclusion does not ignore the importance of the privacy interest in tension with the value of editorial autonomy. Rather, it merely points out that the government's important privacy interests must be accounted for in the evaluation of strict scrutiny, rather than by discarding that evaluation altogether.

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[5] (...continued)
was unlawful activity by third parties in both *Landmark* and *Florida Star*, however, petitioners' effort to interpret the footnote so broadly is unpersuasive. While the footnote is somewhat ambiguous, its citation to *Landmark* strongly suggests that the footnote refers to the issue of punishing a party who is involved in the illegal acquisition. This was the issue the *Landmark* Court reserved: "We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Landmark*, 435 U.S. at 837. Likewise, that issue is not presented here.

B. On The Facts Of This Case, Title III's Disclosure Prohibition Represents A Content-Based Restriction On Speech By The Media

In order to apply intermediate scrutiny to Title III's disclosure prohibition, the Third Circuit was compelled to conclude that the application of the law to these facts constituted a content-neutral speech regulation. *Amici* respectfully disagree with this determination.

Under the Court's cases, the principal inquiry in determining content neutrality is "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Boos v. Barry*, 485 U.S. 312, 320-21 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Therefore, government regulation of speech is ordinarily considered content based if it employs categories that differentiate between instances of speech based upon content or otherwise expressly conditions regulation on the content of speech. *See, e.g., Boos*, 485 U.S. at 319. In other words, if one must examine the content of the defendant's speech in order to determine whether that speech is prohibited, the regulation is ordinarily deemed content based. In the present case, it is only because of the specific content of the speech by the radio station that the plaintiffs' privacy was breached and the statute violated. Had different content been broadcast by the radio station -- content that did not reveal the substance of the telephone conversation between the plaintiffs -- there would have been no liability under the statute.

It is true, as petitioners assert, that even regulations that expressly condition liability on the content of speech have,

on occasion, been characterized as content neutral when the Court has been persuaded that the actual justification for the regulation is unrelated to speech. For example, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld a zoning ordinance that applied only to theaters showing sexually explicit films because the state's asserted concern was not with the content of the films but with the "secondary effects" of crime and prostitution. *Cf. Hill v. Colorado*, 530 U.S. __, 120 S.Ct. 2480 (2000). But, to prevent that exception from swallowing the rule, the Court has repeatedly stressed that regulations cannot be described as content neutral if they are justified by a concern that flows directly from the communicative impact of speech itself. *See Boos*, 485 U.S. at 321; *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. __, 120 S.Ct. 1878, 1885 (2000)(holding that regulations that are justified "on the content of the [regulated] speech and the direct impact that speech has on its listeners" are content based).[6]

The effort to enforce Title III's disclosure prohibition against the media defendants here both conditions the media's liability on the content of its speech and justifies its liability, at least in part, on the basis that the communicative impact of the prohibited speech is harmful. The government does not seriously quarrel with the former observation, but does strenuously dispute the latter. Yet, as the government itself acknowledges, two distinct injuries to privacy rights flow from the unlawful interception and disclosure of an electronic communication: an invasion of privacy that oc-

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[6] The Court has also upheld the regulation of symbolic expression when the state's interest is targeted at the nonexpressive element of the act and the impact on speech is only "incidental." *United States v. O'Brien*, 391 U.S. 367, 382 (1968). This case, however, involves an act of pure expression, not symbolic expression, and the impact on speech is not incidental, but direct. Thus, the *O'Brien* doctrine does not apply.

curs when the communication is intercepted, and a further violation that occurs when the private communication is publicly revealed. According to the government, a central justification for the disclosure prohibition is that it serves to prevent this second injury, by "directly guard[ing] against th[e] further intrusion into the integrity of private communications" that occurs upon disclosure. *See* Gov't Br. at 34. But it is the communicative impact of the defendants' speech that itself constitutes this further breach of privacy. Hence, the logic of the government's own argument demonstrates that Title III was designed to prohibit the communicative impact of the defendants' speech because of an injury caused by that communicative impact.[7]

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[7] Substantially different issues are raised by regulations limiting the use or disclosure of personal data that companies or service providers acquire in the course of their relationships with consumers or clients. For example, the Fair Credit Reporting Act provides that a credit agency may release a consumer's credit report only to certain entities under certain conditions, and criminalizes unauthorized disclosures by employees of the consumer reporting agency. *See* Fair Credit Reporting Act, 15 U.S.C. §1681r (Supp. III 1997); *see also* Video Privacy Protection Act of 1988, 18 U.S.C. §2710 (1994)(prohibiting disclosure of a consumer's video rental records). Similarly, the Secretary of Health and Human Services, acting pursuant to section 264 of the Health Insurance Portability and Accountability Act of 1996, will soon be issuing regulations limiting the disclosure of sensitive medical information. Pub.L.No. 104-191, 110 Stat. 1936.

Strict scrutiny does not generally apply when the government regulates the use of information by parties to a pre-existing commercial or professional relationship, or when it regulates commercial speech. Unlike this case, such regulations do not intrude upon the editorial discretion of the press to speak on matters of public concern. Moreover, unlike Title III's nondisclosure provision, a regulation restricting the use and disclosure of consumer information often represents the only means by which the confidentiality of that information can be preserved. *See* Point II, *infra*.

For these reasons, the content-based prohibition in Title III is strikingly similar to the regulation invalidated by the Court in *Boos v. Barry*, 485 U.S. 312. In *Boos*, a provision of the District of Columbia code prohibited the display of signs criticizing a foreign government within 500 feet of that government's embassy. That regulation, like Title III, was justified on the ground that the communicative impact of the proscribed speech itself inflicted an injury -- in *Boos*, by subjecting foreign diplomatic personnel to the indignity of confronting speech unflattering to their government. *See id.* at 321. Accordingly, Justice O'Connor, speaking for a majority of the Court, concluded that the most exacting scrutiny was required:

> [The government] rel[ies] on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.

Id. at 321.[8]

By contrast, in *Hill v. Colorado*, 120 S.Ct. 2480, the Court recently upheld a statute regulating speech activities as content neutral because, in the Court's view, the statute

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[8] While a portion of Justice O'Connor's opinion spoke for only a plurality of the Court, a majority of the Court joined her conclusion that the regulation merited strict scrutiny because its justification was based on the communicative impact of the regulated speech. *See Boos*, 485 U.S. at 334 (Brennan, J., concurring in part and concurring in the judgment).

was designed to prevent a harmful, nonexpressive feature of the regulated act. At issue in *Hill* was the validity of a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, for any person to "'knowingly approach' within eight feet of another person, without that person's consent," for the purpose of "engaging in oral protest, education, or counseling with such other person." *Id.* at 2484. Although the action prohibited by the statute -- like the action prohibited in *O'Brien* -- undoubtedly encompassed elements of expression, the Court concluded that the prohibition was valid because it was designed to prevent the overly aggressive invasion of personal space by protesters, and not to prevent the communicative impact of the protesters' speech. The Court concluded that, unlike a regulation premised on the notion that the harm associated with "oral protest, education, or counseling" flowed from the communicative impact of those activities, "the [Colorado] statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient." 120 S.Ct. at 2493; *see also id.* at 2495-96.[9]

Consistent with *Hill* and *Boos*, the government agrees that a regulation is content based if it is justified on the basis of the communicative impact of speech. *See* Gov't Br. at 19. Nevertheless, it argues that because Title III's

[9] Concurring, Justice Souter further emphasized the nonexpressive justification for the Colorado statute: "The fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches go to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to get close." *Hill*, 120 S.Ct. at 2501 (Souter, J., concurring).

application depends in part on the means by which the communication is obtained, liability is not in fact justified based on the communicative impact of speech. The conclusion does not follow from the premise. Although liability in this case may not be assessed without reference to some feature in addition to the content of the speech itself, the same was true in *Boos*. Because the law at issue in that case proscribed certain speech only within 500 feet of a government embassy, liability depended in part on the location of the speech. Had the petitioners in *Boos* sought to display *identical* signs at a location that was not within 500 feet of an embassy, the statute would not have prohibited their speech. *See id.* at 315. This fact, however, was irrelevant to Justice O'Connor's analysis in *Boos*: what mattered was the fact that liability was *justified* on the basis of content. *See id.* at 321. As in *Boos*, it is irrelevant to the content-neutrality determination in the present case that liability may not be assessed without reference to the source of respondents' speech. Liability is justified on the ground that the communicative impact of respondents' speech should be proscribed, and that fact renders Title III content based on these facts.

The Third Circuit did not disagree with the foregoing analysis. Indeed, the court below acknowledged that "there is a not implausible argument that the injury associated with the disclosure of private facts stems from the communicative impact of speech that contains those facts." *Bartnicki*, 200 F.3d at 123. After suggesting that the government's privacy-protecting justification was sufficient to render Title III's nondisclosure provision content based, however, the Third Circuit nonetheless concluded that the provision was content neutral. Specifically, the court reasoned that the disclosure prohibition is content neutral because the government proffered an additional justification for the statute -- reducing the market for wiretapped information -- which,

the government alleges, is not based on the communicative impact of the regulated speech.[10]

The flaw in the government's logic is that its market rationale is inextricably tied to its overlapping concern about revealing the contents of an illegally intercepted conversation. Society cares about preventing the initial interception of confidential communications in significant measure because we do not want the content of those communications to be made public. A market in stolen conversations is therefore fundamentally different than a market in stolen jewelry, and the difference lies squarely in our concern about the communicative impact of the unauthorized disclosure. Under the Court's jurisprudence, enforcement of that concern against the media cannot be described as content neutral.

II. TITLE III'S DISCLOSURE PROHIBITION IS AN INAPPROPRIATE MEANS OF FURTHERING THE GOVERNMENT'S COMPELLING INTEREST IN PRESERVING PRIVACY IN THIS CASE

For the foregoing reasons, Title III must be subject to strict scrutiny. Thus, the government is required to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). While *amici* agree that the interest in protecting the confidentiality of private, electronic communications is compelling, *cf. Katz*

[10] The Court has accepted the market rationale in its child pornography decisions. *See New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990). But those cases, unlike this case, involved unprotected speech.

v. United States, 389 U.S. 347, 352 (1967), applying Title III's disclosure prohibition against the media is not the least restrictive means of achieving that goal.

A narrow fit between means and ends is always critical in the First Amendment context, where prophylactic rules are traditionally disfavored.[11] *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963)("Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms"); *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Such a fit is even more important in a case like this one where a restriction on speech not only deprives the speaker of important First Amendment rights, *see* Point I, *supra*, but also deprives the general public of potentially valuable information on matters of general concern. If the government could prohibit the press from publishing information that a source had either unlawfully obtained or unlawfully disclosed, many important stories would never be reported, from government misconduct to corporate malfeasance. Similarly, if the government's market rationale is correct and the government is free to prohibit press coverage of criminal activities that are carried out in part to generate publicity, then a broad range of stories could constitutionally be banned, from acts of civil disobedience to hostage takings.

This Court has never treated that approach as a less restrictive alternative under its First Amendment jurispru-

[11] The Court has stressed that even content-neutral regulations that only incidentally burden speech may not restrict "substantially more speech than is necessary to further the government's legitimate interests." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward*, 491 U.S. at 799). In this as-applied challenge, the restriction on speech is neither content neutral nor incidental. Thus, a closer fit between means and ends is constitutionally compelled.

dence. To the contrary, the Court has consistently invalidated restrictions on the media's ability to publish truthful, newsworthy information even when those restrictions were adopted in pursuit of obviously worthwhile goals. *See Cox*, 420 U.S. at 496-97; *Oklahoma Publishing*, 430 U.S. at 311-12; *Landmark*, 435 U.S. at 842; *Daily Mail*, 442 U.S. at 106; *Florida Star*, 491 U.S. at 541; *Butterworth v. Smith*, 494 U.S. 624, 636 (1990). There was little doubt in each of the cases cited above that the interests at stake -- which included preserving the confidentiality of rape victims' names and juvenile offenders' identities -- were extremely important. Nevertheless, the costs of depriving the public of newsworthy information weighed heavily in the Court's inquiry into whether the regulations at issue were narrowly tailored. *See, e.g., Butterworth*, 494 U.S. at 635-36 (emphasizing the fact that the grand jury secrecy regulation at issue could keep from the public information regarding "unlawful conduct or irregularities on the part of public officials").

Because application of Title III's disclosure provision against the media in this as-applied challenge is subject to strict scrutiny, it may be upheld only if there is no less restrictive manner of furthering the government's compelling interest in preserving privacy. *See, e.g., Boos*, 485 U.S. at 325-29. "If a less intrusive alternative would serve the government's purpose, the legislature must use that alternative." *Playboy*, 120 S.Ct. at 1886; *see also Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). Moreover, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* at 129 (quoting *Landmark*, 435 U.S. at 843). The fact that the legislature has opted for a prophylactic response merely raises the question of less restrictive alternatives, it does not provide the answer. "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a

check on legislative power would be nullified." *Landmark*, 435 U.S. at 844.

In this case, there plainly is a less restrictive alternative available: prohibiting the interception of electronic communications in the first place, and then punishing those who directly engage in such illegal conduct. In fact, this less restrictive prohibition, which Title III already includes, is strikingly similar to the less restrictive alternatives that existed in the earlier cases, discussed in Point I, *supra*, where the Court struck down analogous restrictions on the publication of truthful, newsworthy information by the press. *See, e.g., Florida Star*, 491 U.S. at 538 (emphasizing that "the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech"). Unlike Title III's nondisclosure provision, the prohibition on interception does nothing to impair editorial autonomy. Yet by deterring would-be interceptors, the interception prohibition protects the same privacy interest promoted by the significantly more restrictive prohibition on disclosure. For if the initial interception never occurs, there is no intercepted communication for the press to publish.

"When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 120 S.Ct. at 1888. The government has not met its burden here. It contends that, despite the fact that Title III already prohibits the interception of electronic communications, the confidentiality of those communications cannot be preserved without Title III's disclosure prohibition. The reason, according to the government, is that there is no hope of discovering and prosecuting the individuals that actually illegally intercept the communications. While it is certainly easier to identify and punish the media -- whose violation of the statute is very public --

than it is to identify and punish the illegal interceptor, the fact that it may be challenging to enforce a law does not justify suppressing the freedom of the press. Moreover, the government provides no real support for its claim that law enforcement is incapable of finding individuals who illegally intercept electronic communications. In fact, anecdotal evidence suggests otherwise. As respondents point out in their brief, the identity of the illegal interceptor was known in a large percentage of the reported federal cases involving Title III. Were it nearly impossible for law enforcement officials to discover the identity of these perpetrators, as the government suggests, one would not expect them to appear as defendants so frequently. *Cf. Playboy*, 120 S.Ct. at 1891.

The fact that the government does not prohibit the press from publishing confidential information in other regulatory contexts that present similar enforcement challenges further undermines the government's assertion that it is necessary to gag the press in order to protect the confidentiality of electronic communications. In the grand jury context, for example, federal law prohibits grand jurors, interpreters, stenographers, and others from revealing information that they learn during the course of grand jury proceedings. *See* Fed. R.Crim.P. 6(e)(2). But, as with illegally intercepted communications, any information acquired during a grand jury proceeding can easily be provided to the press anonymously. For this reason, enforcing the confidentiality requirement regarding grand jury proceedings presents difficulties similar to those present in the wiretapping context. Despite the government's legitimate interests in grand jury secrecy, however, *see, e.g., Butterworth*, 494 U.S. at 629-35, the government does not prohibit the press from publishing information that is illegally leaked from a grand jury. The government's choice to criminalize only the leaking (and not the publication) of grand jury information weakens its contention that limitations on the press's editorial autonomy are

necessary to preserve the privacy of confidential communications.

"The feasibility of a technological approach" to protecting the privacy of electronic communications reinforces the conclusion that Title III's disclosure prohibition is not narrowly tailored. *Playboy*, 120 S.Ct. at 1887. In several recent cases, the availability of technological solutions to the problem targeted by the government has been important to the Court's decision to invalidate the regulation at issue. *See id.* at 1887, 1891; *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997); *Sable Communications*, 492 U.S. at 128, 130-31. Moreover, the technological solutions need not already be in widespread use to be relevant to the Court's inquiry. In *Reno v. ACLU*, for example, "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant" to the Court's invalidation of a cyberspeech regulation. *Playboy*, 120 S.Ct. at 1887 (quoting *Reno*, 521 U.S. at 876-77). In the present case, recent advances in private technology have substantially improved the confidentiality of wireless and other electronic communications. The steady transition towards digital wireless communication networks in the last few years has made interception substantially more difficult. And, with the increasing availability of strong encryption technology, wireless communications will soon become even more secure.

Given these alternative options, a direct restraint on the press, of the sort presented here, is neither a less restrictive alternative nor a constitutionally acceptable response. *Cf. Sable Communications*, 492 U.S. at 130 (placing the burden on the government to demonstrate that a less restrictive technological solution to restricting dial-a-porn messages to adults was ineffective).

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,

Petitioners,

v.

FREDERICK W. VOPPER AKA FRED WILLIAMS, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FREDERICK W. VOPPER AKA FRED WILLIAMS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* WFAA-TV AND ROBERT RIGGS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel state statute, for using or disclosing the contents of illegally intercepted communications violates the First Amendment to the United States Constitution.

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INTEREST OF *AMICI CURIAE*

Amici WFAA-TV and Robert Riggs are defendants-appellees in *Peavy v. WFAA-TV, Inc.*, 37 F. Supp.2d 495 (N.D. Tex. 1999), *aff'd in part, rev'd in part*, 221 F.3d 158 (5th Cir. 2000), which presents the same First Amendment question as this case.[1] The litigation in which *amici* are involved illuminates the issues raised here and also gives *amici* a particular interest in this case.

Amici are the subject of a civil lawsuit by Carver Dan Peavy (Peavy), a public official elected a trustee for the Dallas Independent School District (DISD) from 1986 until 1995. 37 F. Supp.2d at 502. By the early 1990s, Peavy controlled purchases of insurance for DISD employees. He was a friend and business associate of insurance agent Eugene Oliver, a felon who had been convicted as an accomplice to murder in an insurance scam. Together, Peavy and Oliver allegedly executed an insurance kickback scheme affecting DISD employees.

Peavy's telephone conversations were intercepted not by petitioners WFAA-TV and Riggs, but by Peavy's next-door neighbor, Charles Harman. Harman testified that he consulted the Dallas County District Attorney's office regarding the intercepted conversations. 37 F. Supp.2d at 502. According to Harman, he asked Assistant District Attorney Bill Geyer whether it would be lawful to listen to the cordless telephone conversations, and Geyer responded, "Absolutely." *Id.* Harman then inquired whether he could record the telephone calls. According to Harman, Geyer replied, "Go ahead. Anything over the air is free." *Id.* Harman called District Attorney John Vance to inform him that Peavy had made certain threats against Harman and that Peavy was engaged in possible improprieties regarding DISD insurance. Vance instructed Harman to "keep

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* state that the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of this Court.

taping." *Id.* at 503. Vance met with Harman on January 17, 1995. Also present were Assistant District Attorney Mike Gillett and Investigator Bob Jennings. According to Harman, all the participants reassured him that his actions were legal. *Id.* at 503 n.3.

Harman also called WFAA-TV and said that he was in possession of information concerning possible corruption of a public official. Riggs, a senior reporter at WFAA-TV, met with Harman, who assured him that his actions had been approved by the Dallas County District Attorney and the Dallas Police Department. *Id.* at 503. WFAA also contacted its attorney, Paul Watler, to determine whether it was legal to use the tape recordings. Watler advised that WFAA-TV could accept and broadcast the tapes. This advice was confirmed in a written legal memorandum dated January 4, 1995. *Id.*

Harman provided WFAA with 18 tapes containing 188 telephone conversations between Peavy and others. *Id.* Several weeks later, Riggs was informed by a law enforcement source about a recent amendment to Title III. Riggs contacted Watler to determine whether the interception of cordless telephone calls was prohibited under the new law. Watler researched the issue and learned that an October 1994 amendment made it unlawful to intercept the radio portion of a cordless telephone call. *Id.* He immediately advised WFAA not to accept any additional tapes from Harman, not to broadcast the tapes already in its possession, and not to confront individuals about conversations on the tapes. But Watler told WFAA and Riggs that they could continue to investigate Peavy. WFAA and Riggs followed this advice. The original tapes were returned to Harman on or about March 1, 1995. *Id.* at 504. Copies of the tapes and all related documents were delivered to Watler for safekeeping. *Id.*

Meanwhile, WFAA continued to investigate Peavy, without receiving any more tapes from Harman. Riggs learned that Peavy had been appointed by the president of the school board to solicit new bids on group term life and disability insurance for DISD employees. 37 F. Supp.2d at 504. Peavy had designated

his associate Eugene Oliver as the exclusive insurance agent to obtain these bids. The contracts were ultimately awarded to two companies represented by Oliver. Thereafter, Oliver split his commissions with Peavy and several others. Riggs also uncovered a similar arrangement between Peavy and Oliver involving a cancer insurance policy that Oliver wanted to negotiate with Mary Kay Cosmetics. *Id.*

In the summer of 1995, WFAA aired a three-part series regarding the relationship between Peavy and Oliver. WFAA did not play or even mention any of the tapes received from Harman during the broadcasts. 37 F. Supp.2d at 504. On July 31, 1995, DISD Superintendent Chad Woolery announced an investigation into the school district's insurance program. Peavy was stripped of his authority over insurance procurement, and DISD stopped paying agent commissions on all insurance contracts. Peavy later resigned from the school board. *Id.*

The FBI conducted a parallel criminal investigation during the same time period. As a result of this investigation, Peavy and Oliver were indicted on more than forty counts of official bribery, conspiracy, and income tax evasion, although they were eventually acquitted of all charges. 37 F. Supp.2d at 504.

The district court held that the First Amendment precluded the imposition of liability on *amici*, but the Fifth Circuit reversed. 221 F.3d 158. *Amici* will be filing a petition for certiorari seeking review of the Fifth Circuit's judgment, which is due October 30, 2000.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case at bar, the *Peavy* case, and the case of *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709), demonstrate the fundamental First Amendment rights abridged by Sections 2511(1)(c) and (d), 18 U.S.C. § 2511(1)(c) and (d), and by parallel state statutes. These cases involve both political speech at the core of the First Amendment and the traditional

role of the press in disclosing corruption and malfeasance by public officials.

I. This case should be decided according to a simple, bright line rule: if a journalist breaks the law to obtain information, she is subject to whatever generally applicable legal penalties may be triggered by the act of misappropriation. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for publishing it, absent a countervailing governmental interest of the highest order. The press has a First Amendment right to examine such information without regard to how it was obtained, to make an independent judgment as to whether it is newsworthy, and to disseminate it to the public. This is the principle of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

Under the new rule proposed by the United States, by the private petitioners, and by their *amici* in these cases, the Pentagon Papers never would have been published by The New York Times and The Washington Post. For the classified documents in that landmark case had been "purloined from the Government's possession and . . . the newspapers received them with knowledge that they had been feloniously acquired." *New York Times Co. v. United States*, 403 U.S. 713, 754 (1971) (Harlan, J., dissenting). Petitioners' *amici* go so far as to say that there was no First Amendment issue at all in the Pentagon Papers case because the press has no constitutional right to distribute "other people's speech." Brief of *Amicus Curiae* Rep. John A. Boehner in Support of Petitioners at 12. This position is plainly untenable.

This Court should make clear that the proper First Amendment analysis does not depend on whether the media defendant may be deemed to have been on notice of, or have participated in, the underlying illegal interception. Any person who intercepts a wire or electronic communication, or procures another person to do so, is subject to punishment under Section 2511(1)(a). The availability of separate sanctions under that section provides *less* reason to punish the disclosure itself under

Section 2511(1)(c), not *more*. While media defendants may be punished for their role in the interception, they should never be punished for exercising their First Amendment rights.

II. Even if the rule of *Florida Star* did not apply here, Section 2511(1)(c) (the "disclosure" provision) would be subject to strict scrutiny under conventional First Amendment analysis. Section 2511(1)(c) is a direct prohibition on speech and nothing but speech. Accordingly, it would be subject to strict scrutiny even if it were deemed to be content-neutral. This Court should hold that the matter of "disclosure" of intercepted communications is governed solely by Section 2511(1)(c) and its state-law counterparts, and may not be treated simply as a form of "use" under Section 2511(1)(d) and corresponding state statutes.

III. Apart from the rule of *Florida Star*, Section 2511(1)(c) and Section 2511(1)(d) are subject to strict scrutiny under conventional First Amendment doctrine because they are content-based prohibitions on speech. They do not operate in a mechanical fashion as a straightforward ban on the verbatim broadcast of tapes of intercepted communications. Instead, Title III requires a court to examine the communicative substance of what a defendant says in order to determine whether it "uses" or "discloses" "the contents of" an illegal interception. For example, in the *Peavy* case the Fifth Circuit held that *amici* could be held liable under Title III even though WFAA did not play or even mention any interception tapes in the television broadcasts. 221 F.3d at 166.

In an analogous way, the New York "Son of Sam" law at issue in *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991), was content-based because it was "directed only at works with a specified content," *id.* at 116 – namely, those manifesting a defendant's "thoughts, feelings, opinions or emotions regarding [his] crime." *Id.* at 109. Just as the New York statute required a court to dissect the content of a book or movie in order to determine whether it expressed a defendant's knowledge about his past misdeeds,

Title III requires a court to examine the communicative substance of a broadcast or publication to determine whether it "uses" or "discloses" "the contents of" a past misdeed (an intercepted communication).

In addition, the prohibitions of Section 2511(1)(c) and Section 2511(1)(d) do not apply unless a court first examines the social meaning of what the speech communicates and determines that it is not "common knowledge." This inquiry into how the listener understands the speech underscores how content-based the statute's prohibition is.

Moreover, Title III's purpose is likewise inextricably linked to the content of speech. Title III is aimed at preventing the psychic harm associated with the disclosure of private facts that a telecommunications user wishes to shield from public view. Such a purpose is content-based and independently triggers strict scrutiny.

IV. Even if intermediate scrutiny were to apply, the government could not meet its burden of justifying Section 2511(1)(c) and Section 2511(1)(d). The statute is a gratuitous restriction on speech, penalizing expression while providing no clear assurance that it serves any important governmental interest – much less any assurance that the statute is a narrowly tailored means of achieving that interest.

V. However this Court decides the First Amendment question presented, the Court should hold that the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing, by clear and convincing evidence, that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." This Court should make clear that this means a defendant may not be held liable if it has a reasonable basis for believing that the interception was lawful.

ARGUMENT

I. THIS CASE IS GOVERNED BY THE RULE OF *FLORIDA STAR*.

A simple, bright line rule is warranted here: if a journalist misappropriates information or otherwise breaks the law to obtain it, she is subject to whatever generally applicable legal penalties may be triggered by the act of wrongfully obtaining the information. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for publishing it, absent a countervailing governmental interest of the highest order. This strict scrutiny principle is apparent from a series of this Court's decisions.

In 1971, The New York Times and The Washington Post published the classified "Pentagon Papers," which had been purloined from the government and delivered to the press. Justice Black, concurring in the per curiam judgment rejecting the government's effort to restrain publication, opined:

> [F]ar from deserving condemnation for their courageous reporting, the New York Times, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that a state could not constitutionally impose civil liability on a television station for broadcasting a 17-year-old rape-murder victim's name, which the station obtained from courthouse records open to public inspection. This Court acknowledged that "the century has experienced a strong tide

running in favor of the so-called right of privacy." *Id.* at 488. Nonetheless, this Court held that, "[a]t the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496. This Court found inapplicable the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968): "The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression – the content of a publication – and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 695. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.*

Next, in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), this Court held that Virginia could not punish a newspaper that had breached the confidentiality of proceedings before a commission on judicial misconduct. A third party provided the information to the newspaper in violation of state law. *Id.* at 830 n.1, 832. The newspaper was aware of the Virginia statute prohibiting publication. *Id.* at 832. This Court observed that forty-seven states, the District of Columbia, and Puerto Rico had established some type of judicial inquiry and disciplinary procedures, and all of them provided for confidentiality. *Id.* at 834. Nevertheless, this Court held that, once the information came into the hands of a newspaper, Virginia could penalize its publication only by demonstrating a clear and present danger to the administration of justice, a standard it had failed to meet. *See id.* at 837 (First Amendment does not permit "the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission").

Similarly, in *Smith v. Daily Mail*, 443 U.S. 97,101-02 (1979),

this Court held that a state could not punish a newspaper for publishing a juvenile murder suspect's name, because "a penal sanction for publishing lawfully-obtained, truthful information . . . requires the highest form of state interest to sustain its validity." This Court reaffirmed the principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103.

And in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), this Court reversed the imposition of civil damages liability against a newspaper that published a rape victim's name in violation of a state statute. The name had been disclosed, in violation of state law, by a Sheriff's Department employee. *Id.* at 527, 536. The newspaper was aware, as evidenced by signs posted in the newsroom, that "the names of rape victims were not matters of public record, and were not to be published." *Id.* at 546 (White, J., dissenting). Nonetheless, this Court reaffirmed *Daily Mail* and warned that the press could not be expected to shoulder "the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 536.

Thus, this Court has held that, where the press manages to obtain otherwise confidential information, it cannot be prevented from publishing it – or be punished for having done so. The rule of *Florida Star* does not depend on whether a statute is content-based or content-neutral. The word "content" does not even appear in *Florida Star*, *Daily Mail*, or *Landmark*. Rather than focusing on content discrimination, this Court has emphasized the need to resolve the conflict between truthful reporting and government-protected privacy interests. *See, e.g., Florida Star*, 491 U.S. at 530. The conflict has been decisively resolved in favor of speech.

The rule does not depend on whether the press obtains the information from the government or from a private person. In *Daily Mail*, for example, the press obtained the information

through witness interviews and other reporting techniques, not through government sources. *See* 443 U.S. at 99, 104.

Nor does the rule depend on whether information has been unlawfully acquired by a third party. This Court has held that a source's illegal conduct cannot be imputed to the media. For example, in *Landmark*, the source apparently acted illegally in disclosing the information, but this Court refused to impute that illegal conduct to the press. *See* 435 U.S. at 831 n.1. Similarly, in *Florida Star*, the Sheriff's Department violated a state statute by releasing the victim's name to the media, but this Court again refused to impute the source's illegal act to the media. *See* 491 U.S. at 536. In addition, applying a different test to so-called tainted information would have no endpoint. Once tainted, the information could never be used or published, creating an enormous burden on the press to ascertain the precise origin of any truthful information.

This Court should make clear that the proper First Amendment analysis does not depend on whether the media defendant may be deemed to have notice of, or to have "participated" in, the underlying illegal interception. In both *Landmark* and *Florida Star*, for example, the media could have been deemed a "participant" in the underlying wrongdoing. In the instant context, any person who intercepts a wire or electronic communication, or procures another person to do so, is subject to punishment under Section 2511(1)(a). The availability of separate liability under that section provides *less* reason to punish the disclosure under Section 2511(1)(c), not *more*. Media defendants may be punished for whatever role they play in an illegal interception, but not for exercising their First Amendment rights. After all, even convicted felons retain their First Amendment rights to speak about their crimes. *See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991).

II. SECTION 2511(1)(C) IS SUBJECT TO STRICT SCRUTINY AS A DIRECT PROHIBITION ON SPEECH AS SUCH AND NOTHING BUT SPEECH.

Even if the rule of *Florida Star* did not apply here, the central statutory provision at issue in this case – the "disclosure" prohibition of Section 2511(1)(c) – would be subject to strict scrutiny under conventional First Amendment analysis. Section 2511(1)(c) expressly targets speech and nothing but speech: it prohibits the "disclosure" of the "contents" of particular communications. Tellingly, although the Solicitor General argues that *Section 2511(1)(d)* "does not apply only to communicative activities" (Govt. Br. 23), he makes no such claim with respect to *Section 2511(1)(c)*.

Laws directly targeting and prohibiting speech as such are properly subject to strict First Amendment scrutiny, *whether or not they are deemed to be content-based*. *See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in judgment) (cataloguing cases involving content-neutral laws in which the Court has applied strict scrutiny).

In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), for example, this Court invalidated a sales tax imposed on newspapers with a circulation of more than 20,000 per week – regardless of their content or message – because a law "to limit the circulation of information to which the public is entitled" is wholly inconsistent with the First Amendment. *Id.* at 250. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), this Court applied "exacting scrutiny" to expenditure limitations that were "direct and substantial restraints on the quantity"of speech itself, *id.* at 39, 44-45, even though they were "neutral as to the ideas expressed." *Id.* at 39. In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court employed "exacting scrutiny" to strike down a ban on the use of paid petition circulators, which "impose[d] a direct restriction which

'necessarily reduces the quantity of expression.'" *Id.* at 419, 420 (ellipsis in original and citing *Buckley*). This Court held that the law "limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Id.* at 422-23. *See also City of Ladue v. Gilleo*, 512 U.S. 43, 55 & n.13 (1994) (content-neutral laws banning entire category of speech may be subject to strict scrutiny); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (applying strict scrutiny to content-neutral law that prohibited grand jury witness from publicly disclosing his own testimony after grand jury's term ended).

This Court has never suggested that a direct limit on speech as such may be subject to anything less than strict scrutiny. Instead, this Court has held that intermediate First Amendment scrutiny is reserved for certain special categories of laws, for which Section 2511(1)(c) cannot qualify. For example, this Court has applied intermediate scrutiny to restrictions on "conduct" having merely an "incidental" effect on speech when applied to a particular example of that conduct that happens to be expressive. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567, 570 (1991) (plurality opinion); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 298 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The *O'Brien* test is triggered only when "'speech' and 'nonspeech' elements are combined in the same course of conduct," 391 U.S. at 376 – that is, where a law applies to "speech-plus" or to conduct "intertwined" or "intermingled" with speech.[2] Where (as here) a ban falls on speech, and speech alone, intermediate scrutiny is wholly inapplicable. *See Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction

[2] *See American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 231 (1974); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

resting solely upon 'speech,' . . . not upon any separately identifiable conduct . . . . *Cf. United States v. O'Brien.*").

Similarly, this Court has applied intermediate scrutiny to time, place or manner rules restricting the noncommunicative aspects of a speaker's activity, such as its decibel level, in order to limit its nuisance impact on others. *See, e.g., Ward v. Rock Against Racism, Inc.*, 491 U.S. 781 (1989). It has long been axiomatic that, in order to qualify for less than strict scrutiny, such rules must not interfere with a speaker's ability to communicate his or her chosen content to the chosen audience.[3] Yet Section 2511(1)(c) prohibits the press from disclosing the contents of intercepted communications at any time, in any place, or in any manner.

Therefore, Section 2511(1)(c) is properly subject to strict scrutiny as a direct prohibition on speech and nothing but speech. The Solicitor General, perhaps recognizing the constitutional infirmity in Section 2511(1)(c), suggests that the same speech may be punished instead under the "use" provision of Section 2511(1)(d), or that the "disclosure" provision of Section 2511(1)(c) can be upheld as part of "a unitary, undifferentiated prohibition on use." Brief of the United States at 24. But that argument ignores the text of Section 2511. The fact of the matter is that in Section 2511(1)(c) Congress *did* single out "disclosure," and hence expression, for a special prohibition.

It is simply not the case that "disclosure" under Section 2511(1)(c) may be treated as a subset of "use" under Section

[3] *See, e.g., Ward*, 491 U.S. at 802; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (under *Schneider v. State*, 308 U.S. 147 (1939), ban on leafleting in public streets cannot be considered time, place, or manner rule); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (ban on handbilling in public areas could not be considered a "time, place, or manner" rule because "[t]here is . . . no restriction in [the] application [of the ban on circulars] with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets").

2511(1)(d) or that speech may be punished under *both* Section 2511(1)(c) and Section 2511(1)(d). If Congress had intended public disclosure to be considered as a type of "use," the legislature would not have set out two separate statutory provisions. The Solicitor General's approach would render Section 2511(1)(c) surplusage, in violation of the canon of statutory interpretation that a court is "not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. . . . [A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (internal quotation omitted). *See also Miller v. French*, 120 S. Ct. 2246, 2253 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 486 (1985).

In addition, the Solicitor General's view that "disclosure" may be treated as a species of "use" is unacceptable because it would create an impermissible risk of double-counting and multiple punishment. Section 2520(a)(2)(B), 18 U.S.C. § 2520(a)(2)(B), imposes statutory penalties of up to $10,000 per violation. If a single instance of expression were treated as a form of *both* prohibited "use" under Section 2511(1)(d) *and* forbidden "disclosure" under Section 2511(1)(c), the media defendant would become subject to double statutory penalties.

Therefore, this Court should hold that Section 2511(1)(d) does not encompass "disclosure." The Court should treat "disclosure" as being governed solely by Section 2511(1)(c). The Court should hold that Section 2511(1)(c) is subject to strict First Amendment scrutiny, which the statute cannot survive.

III. SECTION 2511(1)(C) AND SECTION 2511(1)(D) ARE CONTENT-BASED PROHIBITIONS.

Apart from the rule of *Florida Star*, Section 2511(1)(c) and Section 2511(1)(d) are subject to strict scrutiny under conventional First Amendment analysis for the further reason that they are content-based prohibitions. First, by its terms the statute operates according to the content of speech. Second, the governmental purpose of Title III is inextricably linked to the content of speech.

A. Section 2511(1)(c) and Section 2511(1)(d) Are Content-Based By Their Terms.

Section 2511(1)(c) and Section 2511(1)(d) operate according to the content of expression disseminated by a defendant. Although the Solicitor General has described the scope of Title III as turning solely on the process by which information is collected (e.g., an illegal wiretap) rather than on its content, *see* Brief of the United States at 22, that description is inaccurate. The statute is not a mechanical prohibition on the verbatim broadcast of intercepted communications. Instead, Title III requires a court to examine the content of what a defendant says in order to make a judgment about the degree to which it "uses" or "discloses" "the contents of" an illegal interception. 18 U.S.C. § 2511(1)(c), (d). Title III liability is based on whether the substance of what a defendant says is sufficiently connected, as a matter of communicative meaning and subject-matter proximity, to "the contents of" an illegal interception.

For example, in the *Peavy* case the Fifth Circuit held that *amici* could be held liable under Title III even though WFAA did not play or even mention any interception tapes in the television broadcasts. The Fifth Circuit held that liability could be imposed if a court or jury examined the content of WFAA-TV's speech and determined that the "topics covered in their broadcasts" and "the material reported in those broadcasts" demonstrated that the

speech "used" or "disclosed" "the contents of" an illegal interception. 221 F.3d at 175.

Consider a hypothetical case in which a newspaper, having conducted an independent investigation of a public official's financial records and tax returns as well as having been provided with tapes of intercepted conversations involving him, publishes an article accusing the official of "corruption." A court could not even begin to determine whether that accusation "uses" or "discloses" "the contents of" an intercepted communication without analyzing the expressive meaning of the newspaper's charge and determining how closely it is linked to the information learned from the tapes. What exactly did the newspaper mean by "corruption," and on what facts did the newspaper base its accusation? If the newspaper had learned from the official's tax returns that he had engaged in sham business transactions, while a taped phone call revealed that the official had actually been bribed, does the charge of "corruption" "use" or "disclose" "the contents of" the intercepted communication? By calling the official "corrupt," did the newspaper mean simply that he was of low moral standing or did it mean that he had transgressed anti-bribery laws? The necessity of such an inquiry demonstrates the content-based nature of the prohibition on speech.

In an analogous way, the "Son of Sam" law at issue in *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991), was content-based because it was "directed only at works with a specified content," *id.* at 116 – *i.e.*, those expressing a defendant's "thoughts, feelings, opinions or emotions regarding [his] crime." *Id.* at 109. This Court explained that the law would therefore extend to "such works as . . . the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard." *Id.* at 121.

Title III functions, in effect, as a law requiring St. Augustine

to confess "the contents of" (18 U.S.C. § 2511(1)(c), (d)) his eavesdropping. Just as the New York "Son of Sam" statute requires a court to parse the content of a book or movie in order to determine whether it reflects a defendant's knowledge of his past misdeeds, Title III requires a court to examine the communicative substance of a broadcast or publication to determine whether it "uses" or "discloses" "the contents of" a past misdeed (an intercepted communication). Indeed, Title III is more objectionable, in First Amendment terms, than the "Son of Sam" law. Title III does not merely prohibit a person who knows of an illegal interception from pocketing the financial proceeds of that crime; Title III flatly prohibits the person from "using" or "disclosing" the informational "contents" (18 U.S.C. § 2511(1)(c), (d)) flowing from the interception. This Court has noted the difficulty of applying the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1963), under which evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment are inadmissible.[4] The inquiry mandated by Title III is even more slippery and subjective.

Under Title III, whether civil liability is imposed on a defendant is determined precisely by what he says and by what ideas and information he conveys. "[B]y any commonsense understanding of the term, the ban in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).[5]

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[4] *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (metaphor can be "misleading"); *Segura v. United States*, 468 U.S. 796, 815 (1984) ("fruit of poisonous tree" doctrine inapplicable where "the link between the illegality and that evidence was sufficiently attenuated to dissipate the taint"); *Nix v. Williams*, 467 U.S. 431, 442, 445 (1984) (doctrine is "admittedly drastic and socially costly" and rigid application would be "formalistic, pointless, and punitive").

[5] Contrary to the argument of petitioners' *amici*, *see* Brief of *Amicus Curiae* Rep. John A. Boehner in Support of Petitioners at 4-8, the statute here is not

Prohibitions that operate according to the content of speech trigger strict scrutiny. In *Burson v. Freeman*, 504 U.S. 191 (1992), for example, this Court applied strict scrutiny to a statute prohibiting the solicitation of votes and the display of campaign materials within 100 feet of a polling place. A plurality explained that the statute's terms, which "distinguish[ed] among types of speech," "require[d] that the statute be subjected to strict scrutiny." *Id.* at 207. *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (applying strict scrutiny to state statute prohibiting the distribution of anonymous campaign literature, on the ground that "the category of covered documents is defined by their content").

Similarly, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated a ban on "editorials" — regardless of viewpoint or subject matter — by public broadcast stations receiving government funds. This Court observed that "the scope of [the] ban is defined solely on the basis of the content of the suppressed speech": "in order to determine whether a particular statement by station management constitutes an 'editorial' proscribed by [the statute], enforcement authorities must necessarily examine the content of the message that is conveyed." *Id.* at 383. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), this Court held that a law taxing general interest magazines, but exempting newspapers and religious, professional, trade, and sports journals, was content-based because, "[i]n order to determine whether a magazine is subject to sales tax, . . . enforcement authorities must necessarily

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like the Copyright Act, which restricts publication of a particular form of expression, but does not restrict dissemination of the facts or ideas expressed. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985). The prohibition on speech in Section 2511(1)(c) and Section 2511(1)(d) is broader than the Copyright Act because Title III bans the use or dissemination of facts and ideas expressed regardless of the form the communication takes. In addition, Section 2511(1)(c) and Section 2511(1)(d) cannot be applied without examining the content of communication.

examine the content of the message that is conveyed." The same is true with respect to Section 2511(1)(c) and Section 2511(1)(d).

The scope of the prohibition in Section 2511(1)(c) and Section 2511(1)(d) is content-based for another, independent reason: it turns on an assessment of the communicative effect of the expression on "the minds of the [audience]." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 (1991) (Souter, J., concurring). As the Solicitor General interprets Title III, it does not "prohibit anyone from disseminating that which is already common knowledge." Brief of the United States at 44. "The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited by Section 2511(1)(c) and (d)." *Id.* (internal quotation omitted).

Thus, when a media defendant publishes information – even the verbatim transcript of an interception illegal under Title III – the prohibitions of Section 2511(1)(c) and Section 2511(1)(d) do not apply unless a court first examines the communicative substance of the speech and determines that it is not "common knowledge." This inquiry into how a listener understands the speech and its social meaning renders the statute content-based. *See Regan v. Time, Inc.*, 468 U.S. 641, 648, 655-56 (1984) (inquiry into color and size of currency reproduction is content-neutral, but exception for currency reproductions serving "philatelic, numismatic, educational, historical, or newsworthy purposes" is content-based). *See also* Brief of Petitioners Bartnicki and Kane at 23 n.6 ("A prohibition of disclosure of information presented to a grand jury may be viewed as content-based . . . .").

B. The Statutory Purpose Is Content-Based.

Section 2511(1)(c) and Section 2511(1)(d) are content-based for the additional reason that the governmental purpose they are designed to serve is derived completely from the content of speech. The purpose of Title III, according to its proponents, is

to prevent the psychic harm associated with the disclosure of private facts that a telecommunications user would wish to shield from public view. The Solicitor General, for example, asserts that the statute "protects against the aggravated injury to privacy that occurs when illegally intercepted communications are then exploited or publicly disseminated." Brief of the United States at 14. That is why "the interests underlying [Title III's] prohibition 'fade once information already appears on the public record.'" *Id.* at 44 (citation omitted).

Similarly, the private petitioners insist that Title III is necessary to protect "the participants to a private conversation [who] speak unguardedly of their friends and adversaries, talk in deepest confidence of their strategy regarding a labor dispute, and even give out their telephone numbers." Brief of Bartnicki and Kane at 30. The private petitioners stress that, in the intercepted conversation in this case, "Bartnicki gave Kane both her home telephone number and her cellular carphone number." *Id.* at 5. They also note that "[w]e send sophisticated legal documents, a bid, a love letter [electronically]." *Id.* at 27 (quoting statement of Sen. Leahy). "None of us is so circumspect in our speech that we can countenance the later use of our most private utterances, played with the shattering impact of a broadcast in our own words." *Id.* at 35-36 (quoting S. Rep. No. 90-1097, at 175 (additional views of Sen. Hart)). Of course, the sensitivity of these matters reflects the content-based nature of the governmental interest.

Petitioners' *amici* similarly discuss the importance of avoiding "the inhibition of candid exchanges," and they compare the interests underlying Title III – "protecting the confidentiality of private conversations" – to interests which this Court has previously found to trigger strict scrutiny: "protecting . . . the names of young wrongdoers and the identity of innocent victims of crime." Brief *Amicus Curiae* of the Cellular Telecommunications Industry Assn. in Support of Petitioners at 3, 13. *Amici* compare electronic interception to "the perusal of one's private diary" and "the Orwellian nightmare of having their

most private conversations broadcast over the Nation's airwaves." Brief of *Amicus Curiae* Rep. John A. Boehner in Support of Petitioners at 24, 27. Even the stated governmental interest in fostering public willingness to use new communications technologies rests, at bottom, on preventing disclosures that would be embarrassing because of the content they would expose to a media defendant's listeners and readers.

Far from supporting the law, the interests purportedly served by Section 2511(1)(c) and Section 2511(1)(d) reveal the inevitably content-based nature of the statute. The interests stem from the communicative impact of speech – what information it contains and how the audience would understand it. Yet this Court has instructed that "reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *see also City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion) ("If the government interest is related to the content of expression, . . . then the regulation falls outside the scope of the *O'Brien* test."); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J., joined by Stevens and Scalia, JJ.) ("regulations that focus on the direct impact of speech on its audience" – the speech's "primary effects" – are not properly treated as content-neutral).

Indeed, in another context the Solicitor General acknowledges that a law is content-based if its "manifest purpose [is] preventing public knowledge of the anticipated content . . ., *e.g.*, allegations that might injure a 'judge's reputation' or damage public 'confidence in the judicial system.'" Brief of the United States at 31 n.9. Section 2511(1)(c) and Section 2511(1)(d) must therefore be deemed content-based. The statute necessarily triggers strict scrutiny for this independent reason.

IV. SECTION 2511(1)(C) AND SECTION 2511(1)(D) FAIL INTERMEDIATE SCRUTINY.

This Court has repeatedly held that, even under merely

intermediate scrutiny, restrictions on speech cannot be justified by unadorned speculation, even if labeled "common sense." In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), for example, a plurality of this Court explained that a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), this Court noted, in addition to the extensive factual findings made by Congress in the text of the statute itself, "a record of tens of thousands of pages" supporting the rules. *Id.* at 187 (internal quotation omitted). This Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." *Id.* at 196. This Court pointed to "specific support" for Congress' conclusion (*id.* at 197): "[s]ubstantial evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). Nothing of the sort exists in this case.[6]

Section 2511(1)(c) and Section 2511(1)(d) impose an

[6] *See also Greater New Orleans Broadcasting Council v. United States*, 527 U.S. 173, 188 (1999) ("'Th[e] [government's] burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion) (rejecting government's "common sense" justification: "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (expressly rejecting government's "common sense" justification for restriction on speech); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech).

absolute, categorical ban on speech traceable to an illegal interception in order to serve what the Solicitor General describes as a "deterrent function" – to reduce the incentive of would-be eavesdroppers to intercept electronic communications by "dry[ing] up the market for this material." Brief of the United States at 40. But the Solicitor General can point to little beyond speculation and analogies to quite different contexts ("fencing" of stolen property and child pornography, for example) to support his argument. It seems equally plausible to assume that, unlike the markets for stolen property and child pornography, which are driven primarily by economic considerations, few if any eavesdroppers are motivated chiefly by the prospect of delivering information to the press. Rather, like Mr. Harman in the *Peavy* case, they are motivated by other considerations and will not alter their behavior as a result of Section 2511(1)(c) and Section 2511(1)(d). Tellingly, Harman began taping *before* he even approached WFAA-TV, and he continued to tape even *after* WFAA-TV informed him that it would not accept any additional tapes.

The only evidence the Solicitor General is able to muster is hopelessly out-of-date and relates to the technological state of the art in 1968 and 1986. *See* Brief of the United States at 2, 3, 5, 24, 37, 44 (citing legislative materials from 1968); *id.* at 3-4, 5, 36, 37 (citing legislative materials from 1986). This evidence fails to consider (to take obvious examples) advances in encryption, public key infrastructure, digital phones, and other technological means of protecting privacy short of a ban on speech.[7]

[7] *See, e.g., Hard of Hearing*, NEWSWEEK, Dec. 13, 1999, p. 78 ("Digital transmissions, used for most mobile phones and soon for almost all telecommunications, are harder to intercept than the old analog signals. Whereas analog signals are transmitted in a continuous stream, digital signals are broken into small, hard-to-track packets. E-mail and telephone calls that use the Internet are almost impossible to intercept. While digital packets can be snatched in bulk, reassembling them is very difficult. The sheer volume of

Thus, the Solicitor General has failed to meet his burden of justifying Section 2511(1)(c) and (d). The statute is a gratuitous restriction on speech, penalizing expression while providing no clear assurance that it serves any important governmental interest – much less any assurance that the statute is a narrowly tailored means of achieving that interest.

Far from arguing that Section 2511(1)(c) and Section 2511(1)(d) are narrow restrictions, the private petitioners contend that the statute is written "in broad terms" whose effect is "comprehensive[]." Brief of Bartnicki and Kane at 8. This very breadth and comprehensiveness represents a particularly significant source of constitutional concern under intermediate scrutiny. In *Edenfield v. Fane*, 507 U.S. 761 (1993), for example, this Court held that a flat ban on personal solicitations by accountants could not survive intermediate scrutiny as a means of preventing fraudulent solicitations. Reaffirming the principle that "[b]road prophylactic rules in the area of free expression are suspect," *id.* at 777 (internal quotation marks omitted), this Court required a showing that personal solicitations were so likely to result in fraud that, without a flat ban, a serious risk of harm would remain. *Id.* at 774-77.[8]

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global information makes it hard to sort out key words and phrases. Encryption, once rare in everyday commerce and communication, has been made commonplace by software programs that anyone . . . can get. . . . New technology poses obstacles to eavesdropping that may be virtually insuperable."); *Cordless Phones*, CONSUMER REPORTS, Nov. 1998, p. 48 ("It's extremely difficult to eavesdrop on a digital phone"); Advisory Committee on Online Access and Security - Comment, P004807, Comments of Entrust Technologies, Inc. on April 19-20 Draft Report of The Advisory Committee on Access and Security of the Federal Trade Commission (April 27, 2000) (discussing improvements in privacy protection with technologies such as public key encryption, digital signatures, certification, "hash" functions, and private keys), available at, http://www.ftc.gov <http://www.ftc.gov/>.

[8] *See also Greater New Orleans Broadcasting Council*, 527 U.S. at 193 (noting "the availability of other regulatory options which could advance the asserted interests 'in a manner less intrusive to First Amendment rights'"); *Rubin v. Coors Brewing Co.*, 514 U.S. at 491 (citing "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech).

V. THIS COURT SHOULD MAKE CLEAR THAT A DEFENDANT MAY NOT BE HELD LIABLE IF IT HAS A REASONABLE BASIS FOR BELIEVING THAT THE INTERCEPTION WAS LAWFUL.

However this Court decides the First Amendment question presented, it should hold that a defendant may not be held liable under Section 2511(1)(c) or Section 2511(1)(d) if he had a reasonable basis for believing that the interception was lawful. The requisite intent is statutorily defined as "knowing or having reason to know" that the information in question "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c), (d). Some lower courts have incorrectly interpreted this scienter language as requiring a plaintiff to show only that the defendant knew, or had reason to know, sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited by Title III. These courts have refused to consider the defense that the defendant held a good faith view (based on advice from law enforcement authorities, for example) that the interception was lawful. *Peavy*, 221 F.3d at 178.

This Court should make clear that such a construction of the scienter requirement of Section 2511(1)(c) and Section 2511(1)(d) is incorrect. It may be permissible as an initial matter to presume a defendant's knowledge of the Title III legal requirements. But the scienter requirement should be interpreted as allowing the defendant to negate any presumption that he was aware of the Title III prohibition by demonstrating that he

reasonably relied on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information. Such evidence should properly be treated as exculpating the defendant from liability by demonstrating that he did not know, or have reason to know, that the interception was illegal. This construction is more faithful to the statutory language enacted by Congress because it gives meaning to the decision to place the phrase "in violation of this subsection" after the verb "know[s] or ha[s] reason to know[]." By any common sense understanding, a defendant who has been advised of the lawfulness of conduct by local police, the district attorney, and his own counsel has no "reason to know" that the conduct violates Title III.

In the *Peavy* case, for example, Harman assured WFAA and Riggs that the lawfulness of his actions had been confirmed by the Dallas County District Attorney and the Dallas Police Department. 37 F. Supp.2d at 503. The district court also found that Paul Watler, WFAA's legal counsel, advised News Director John Miller that WFAA-TV could accept and broadcast the tapes. This advice was confirmed in a written legal memorandum dated January 4, 1995. *Id.* As soon as WFAA and Riggs learned that the interceptions were unlawful, they stopped accepting tapes from Harman, returned the original tapes to him, and transferred all copies of the tapes and related documents to their attorney for safekeeping. *Id.* at 503-04. The district court commended WFAA and Riggs for "attempt[ing] to determine whether the interceptions were legal. Their actions were consistent with those of a responsible journalist – to investigate leads, verify facts, and publish newsworthy information. To require anything more would undoubtedly result in 'timidity and self-censorship.'" *Id.* at 518.[9]

[9] Nonetheless, both the district court and the Fifth Circuit in the *Peavy* case held that WFAA and Riggs could not assert a defense based on the advice they received from the government and from their attorney. *See* 37 F. Supp.2d at 511 (noting that the defendants' argument nonetheless "has some appeal");

This case presents an opportunity to articulate the contours of the intent requirement because the government has raised the scienter issue as a means of defending Title III under the First Amendment. The Solicitor General maintains that Title III's restrictions on use and disclosure do not impermissibly chill protected speech precisely because "the prohibitions in Sections 2511(1)(c) and (d) are violated only when a defendant 'know[s] or ha[s] reason to know' that the communication was intercepted *in violation of Title III.*" Brief of the United States at 45 (emphasis added). "That scienter requirement is demanding." *Id.* "It imposes no duty of inquiry on a person to ferret out the provenance of the information." *Id.* at 15. "[U]nless a person actually possesses information from which he or a reasonable person would infer that the communication was unlawfully intercepted, liability cannot attach." *Id.* at 46. A defendant should thus be able to show his reasonable belief, on the basis of the advice of law enforcement officials and legal counsel, as well as other information, that the communications had *not* been unlawfully intercepted.

The United States has itself urged that, to the extent any residual concerns remain regarding the chilling effect of the challenged provisions, "those concerns could be addressed by procedural measures that stop short of invalidating the provisions themselves." *Id.* One of the most obvious means of reducing the possibility of a chilling effect would be to adopt a rule that a defendant can demonstrate lack of the requisite scienter by showing that he held a reasonable, good faith view based on advice from law enforcement authorities, legal counsel, or similar sources that his actions were not unlawful under Title III. In addition, this Court should accept the Solicitor General's invitation to adopt an elevated requirement of proof of scienter in civil cases, in the form of a standard of "clear and convincing" evidence. *Id.*; *see also United States v. X-Citement Video, Inc.*,

221 F.3d at 178.

513 U.S. 64, 68-69 (1994) (rejecting "[t]he most natural grammatical reading" of scienter provision in order to create additional defense to avoid First Amendment issue).

Denying a defendant the ability to demonstrate a good-faith belief in the legality of the interception would draw an arbitrary line between the defendant's knowledge of underlying facts relevant to lawfulness (regarding which a defendant may put on evidence) and the defendants' reasonable understanding of the legal standard established by Section 2511(1)(c) and (d) (regarding which a defendant would not be allowed to offer proof, under the view of such courts as the Fifth Circuit in *Peavy*). Yet the statutory language draws no distinction whatsoever between these two categories. Section 2511(1)(c) and Section 2511(1)(d) refer to whether a defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." The statute does not differentiate between knowledge of underlying facts relevant to lawfulness and knowledge of the governing legal standard.

Moreover, it is unreasonable to deny a defendant the opportunity to demonstrate that he reasonably believed an interception was lawful. It would permit liability to be imposed even if the defendant has been assured in writing by the Attorney General herself that the interception in question is entirely lawful under Section 2511. To impose liability in these circumstances raises serious constitutional questions. This Court has held that it runs afoul of due process to punish "a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438 (1959); *see also Lambert v. California*, 355 U.S. 225, 227 (1957) (Los Angeles ordinance requiring felons to register their presence in the city "violates due process where it is applied to a person who has no actual knowledge of his duty to register"). This principle is underscored by the First Amendment rights at stake. If the press cannot rely on authoritative legal advice to confirm the permissibility of traditional methods of newsgathering, there will be an unacceptable risk of chill, timidity, and self-censorship.

Permitting a defendant to show that he reasonably believed an interception was lawful would not amount to judicial creation of a "mistake of law" defense. A "mistake of law" defense is a claim that a defendant's subjective belief in the lawfulness of his conduct excuses a legal violation. Here, defendants' state of mind as to the legality of their conduct bears directly on whether they possessed the requisite scienter under the statute. The issue is a matter of statutory construction of Section 2511, informed by due process and First Amendment principles. As the commentary to the Model Penal Code explains, "The general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element." Model Penal Code § 2.02, comment 11 at p.131 (Tent. Draft No. 4, 1955).

This Court has endorsed a similar approach in other contexts. In *Liparota v. United States*, 471 U.S. 419 (1985), for example, this Court held that a federal statute relating to food stamp fraud (7 U.S.C. § 2024(b)) required proof that the defendant knew his conduct to be unauthorized by the applicable statute or regulations. The relevant provision punished any person who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized [by statute] or the regulations." 471 U.S. at 420. The government argued that the term "knowingly" modified only the "use, transfer, acquisition, alteration, or possession" of the food stamps and that the government was not required to prove that the defendant was aware that such use, transfer, acquisition, alteration or possession also violated the law. This Court rejected the government's argument, holding that "§ 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425.

Similarly, in *Morissette v. United States*, 342 U.S. 246 (1952), this Court held that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion. This Court explained

that, under English common law, criminal culpability generally arose only "from concurrence of an evil-meaning mind with an evil-doing hand." *Id.* at 251. And in *Staples v. United States*, 511 U.S. 600 (1994), this Court held that, to be criminally liable under 26 U.S.C. § 5861(d), a defendant must know that his weapon possessed automatic firing capability so as to make it a machinegun as defined by the National Firearms Act. "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

CONCLUSION

The judgment of the Court of Appeals invalidating Section 2511(1)(c) and Section 2511(1)(d), as well as their state-law counterparts, as applied, should be affirmed. This Court should make clear that Section 2511(1)(c) and Section 2511(1)(d) trigger strict scrutiny (not merely intermediate scrutiny) under the First Amendment, which they cannot survive.

Respectfully submitted.

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IN THE

Supreme Court of the United States

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,

Petitioners,

—v.—

FREDERICK W. VOPPER, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FREDERICK W. VOPPER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF MEDIA ENTITIES AND ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici and their members are involved in the gathering and reporting of news to the American public.[1] The media entities and organizations that submit this brief include the publishers of newspapers, including *The New York Times*, *The San Diego Union-Tribune*, *USA Today*, the *Houston Chronicle*, the *Miami Herald*, the *Denver Rocky Mountain News*, the *Chicago Tribune*, and the *Washington Post*; magazines, including *The New Yorker*, *Business Week*, and *Time*; national broadcast news networks, including ABC, Inc., CBS Broadcasting Inc., National Broadcasting Company, Inc., and Cable News Network; the Associated Press; and associations that defend First Amendment rights, including the Magazine Publishers of America, Inc., the Newspaper Association of America, the Pennsylvania Newspaper Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists. A more detailed statement of the *amici* is annexed to this brief.

Amici are vitally interested in and deeply concerned about any ruling that could result in the imposition of sanctions against journalists for reporting truthful matters of public significance about which they become aware as a result of entirely lawful and wholly routine newsgathering efforts. This case raises that spectre and *amici* submit this brief to set forth their views as to why the judgment of the Court of Appeals for the Third Circuit should be affirmed.

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici curiae* and its members made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The parties have consented to the filing of this brief; letters of consent have been filed with the Clerk of this Court. Sup. Ct. R. 37.3.

INTRODUCTION

From the time individuals first consider becoming journalists, two principles are drilled into them. Both are at risk in this case.

The first is that telling the truth about matters of public interest is what journalism, at its best, is all about. Journalists who consult codes of ethics written about their chosen field read the repeated exhortation that their role is to "seek truth and report it"[2] and that "truth is [their] guiding principle."[3] Journalists employed at newspapers, magazines and broadcasters are instructed that "the most important" quality of any story "is accuracy,"[4] that "above all," a publication "must be factually accurate,"[5] and that "[t]he principle[ ] of accuracy" stands "at the very heart of journalism."[6] Journalists who read the writings of the most thoughtful and accomplished leaders of their community learn that while news is "at most a provisional kind of truth, the best that can be said quickly," the judgment journalists make about what is true "stands near the very center of the press's social purpose in a self-governing society."[7] It should come as no surprise, then, that journalists who read opinions of this Court find unsurprising this Court's repeated references to "the overarching public interest, secured

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[2] *Society of Professional Journalists Code of Ethics* 1 (revised and adopted, 1996).

[3] *Associated Press Managing Editors Code of Ethics* 1 (revised and adopted, 1995).

[4] *Time Inc. Editorial Guidelines* 11.

[5] *The Business Week Editorial Handbook* 5.

[6] Jay Black, et al., *Doing Ethics in Journalism* 43 (1993).

[7] Jack Fuller, *News Values* 5 (1996); *see also* David S. Broder, *Behind the Front Page* 19 (1987) ("[t]he way we cover news is to dig for facts, in hopes that they will yield an approximation of truth").

by the Constitution, in the dissemination of truth." *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 533 (1989) (citation and internal quotation omitted). That public interest is directly imperiled in this case.

So is the journalistic norm that in the course of gathering news, journalists should affirmatively seek the truth from those who have it—including people who may themselves be subject to constraints limiting their ability to speak. This applies to the gathering of news both about government and about the private sector. To offer only a few examples:

- When journalists who attended a press conference called by a candidate who had lost a judicial election at which the losing candidate played allegedly incriminating tapes of telephone conversations of the victorious candidate, they published the information, notwithstanding that anyone who engaged in wiretapping was plainly guilty of a federal and state crime;[8]
- When the *Virginian Pilot* learned from various participants in a confidential judicial disciplinary proceeding, that charges of incompetence against a juvenile court judge were under consideration, the newspaper published an article identifying the judge notwithstanding that the sources (and the newspaper itself) were subject to criminal sanctions for revealing the information;[9]

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[8] *See Keller v. Aymond*, 722 So.2d 1224 (La. Ct. App. 1998), *writ denied*, 742 So.2d 551, 552 (La. 1999), *cert. denied sub nom. Central Newspapers, Inc. v. Johnson*, 120 S. Ct. 397 (1999).

[9] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). *See* Appendix at 46a, *Landmark Communications, supra* (No. 76-1450) ("*Landmark Communications* Appendix") (containing article referring to sources). *See also Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (Cal. Ct. App. 1986)

- When a journalist was provided with information relating to potentially corrupt conduct of a United States senator based upon documents illicitly (and probably illegally) obtained by one of the senator's aides from the senator's files, the information was duly published;[10]
- When highly classified documents were made available to journalists that revealed information about such subjects as how the United States became embroiled in the Vietnamese conflict,[11] how the FBI's Surreptitious Entry Program routinely breaks into houses, offices, and warehouses,[12] and how the United States had masterminded a 1953 coup d'etat in Iran,[13] the information was published notwithstanding that the sources were not authorized to reveal the information and could have been subject to criminal or civil sanctions for doing so; and
- When the *New York Times* was provided with secret, internal documents of a cigarette company revealing its knowledge of significant health risks of that product far earlier than had previously been publicly disclosed, the newspaper published an article based on the documents

(sustaining demurrer to suit against newspaper and reporters for publishing article about confidential fact that Commission on Judicial Nominees Evaluation had found plaintiff not qualified for judicial appointment).

[10] *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

[11] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[12] David Burnham, *Above the Law* 130-34 & n. 1 (1996).

[13] James Risen, *The C.I.A. in Iran—A Special Report: How a Plot Convulsed Iran in '53 (and in '79)*, N.Y. Times, Apr. 16, 2000, at A1.

notwithstanding the claims of the company that the documents had been stolen by a paralegal and were subject to a judicial protective order that bound at least the paralegal.[14]

We wish to be clear: As this Court is well aware, journalists do not publish every scrap of truthful information they receive, even if the information is newsworthy.[15] But they do proceed on the understanding that they are entitled to seek information from those that have it and that they may print or broadcast the truthful and newsworthy information that they lawfully gather.

For journalists, then, the notion that liability may be imposed upon them for doing nothing more or less than reporting truthfully about newsworthy events is deeply disturbing. While not all journalists are aware of the judicial provenance of Justice Stewart's observation that "[t]hough government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press . . . ,"[16] they are well aware

[14] Phillip J. Hilts, *Tobacco Company Was Silent on Hazards*, N.Y. Times, May 7, 1994, at A1.

[15] To cite only two examples, no journalistic organization published the fact (which was well known in the journalistic community) that during the lengthy period in which Iranian "students" held many Americans hostage after the revolution in that country in 1979, some Americans were being protected in the Canadian embassy in Teheran. Nicholas Lemann, *Keeping the Secret: Many Reporters Were Silent On Escapees' Whereabouts*, Wash. Post, Jan. 31, 1980, at A1. Similarly, newspapers and broadcasters, at the request of the CIA, refrained from publishing truthful information in their possession about ongoing efforts of the United States to recover Soviet hydrogen-warhead missiles and code books from a sunken Russian submarine. *See* Tom Wicker, *On Press*, 213-23 (1978).

[16] *Landmark Communications*, 435 U.S. at 849 (Stewart, J., concurring).

of the applicability of that principle to their professional lives. Yet that concept too is at risk in this case.

Here, two union leaders (one the union's president, the other its chief negotiator), engaged in a telephone call in which the union's president told his colleague that unless a sufficient pay increase was offered by city officials, "we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . ." Joint Appendix at 46.

There can be no doubt that a broadcast accurately reporting that threat is highly newsworthy. Indeed, there can be no doubt that if someone who was concealed (inadvertently or purposefully) near the union's president had heard him make that threat and had advised a journalist of what he had heard, that no liability could possibly be imposed on the *journalist* for accurately publishing the threat. Here, however, radio stations and a journalist have been sued for doing no more than broadcasting a tape of the conversation that all agree was made by an unknown third person who made it available to an opponent of the teachers' union who, in turn, made it available to the stations.

The central issue presented by this case is thus straightforward. It is whether journalists and their organizations may be sanctioned for doing nothing more than accurately recounting wiretapped conversations made available to them, which they had no direct or indirect role in obtaining. We believe that they may not and that the decision of the Third Circuit should be affirmed.

SUMMARY OF ARGUMENT

This brief maintains that the decision below should be affirmed based upon the analysis set forth by this Court in the line of cases culminating in *The Florida Star* v.

B.J.F., 491 U.S. 524 (1989). The rule of the *Florida Star* line of precedent is that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a State interest of the highest order . . . ." *Id.* at 541; *see also Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). (Point I.A., *infra.*)

In this case, the conduct of the media respondents falls well within the zone of the First Amendment protection articulated in *Florida Star*. The wiretapping statute at issue violates the First Amendment since it is not narrowly tailored to a state interest of the highest order. The interests asserted in defense of the wiretapping statute—primarily that of protecting the privacy of telephone conversations—are plainly significant but are no more compelling than the interests at issue in *Cox Broadcasting* (privacy of the identity of rape victims); *Florida Star* (same); *Landmark Communications* (reputational interests of judges and judicial integrity); and *Daily Mail* (anonymity of juvenile offenders for purposes such as rehabilitation). Moreover, the legislative history does not support the proposition that Congress viewed publication or disclosure of wiretapped materials by unrelated third parties as central to the purpose of outlawing wiretaps. The broad ban on *any* dissemination by *anyone* coming into possession of the materials regardless of the circumstances establishes a *per se* rule of liability that cannot coexist with the First Amendment. Finally, the legislative landscape is far from uniform in the states: twenty-one states do not provide any civil remedy against third parties who disseminate wiretapped communications. (Point I.B., *infra.*) If there is any case in which liability could constitutionally be imposed on the

press for truthfully reporting newsworthy information that it lawfully obtained, it is not this one.

Petitioners' argument that the *Florida Star* line of cases is rooted in this Court's concern over content-based statutes misses the mark. Nothing in this line of authority even discusses such a concern. Instead, the *Florida Star* line of precedent is based upon "the overarching public interest, secured by the Constitution, in the dissemination of truth." *Florida Star*, 491 U.S. at 533-34. (Point II.A., *infra.*)

Finally, we demonstrate that Petitioners likewise fail in their effort to establish that the information at issue here was "unlawfully obtained" by the media respondents. There is no issue here of the media respondents acting in concert with the original source. Nor does the statute at issue make unlawful the receipt of wiretapped information. *See Florida Star*, 491 U.S. at 536 (noting likewise that Florida had not taken the step of proscribing the receipt of information). Moreover, sanctioning the press for publishing information that may ultimately have been unlawfully obtained by a source unconnected to the press would violate the First Amendment. (Point II.B., *infra.*)

ARGUMENT

I. THE DECISION OF THE THIRD CIRCUIT SHOULD BE AFFIRMED BASED ON *FLORIDA STAR*

We start with the ruling in *Florida Star* itself. In that case, this Court considered the constitutionality of a Florida statute making it unlawful to " 'print, publish or broadcast . . . in any instrument of mass communication' " the name of a rape victim. *Florida Star*, 491 U.S. at 526. The case presented a painful conflict between the

First Amendment and the privacy interests asserted by the rape victim. Those interests were substantial. They included not only the privacy of victims of sexual offenses but the physical safety of such victims and the goal of encouraging victims to report such crimes without fear of exposure (*id.* at 537). Nonetheless, after reviewing relevant precedent, this Court held as follows:

> "[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."

Id. at 541. The Court then ruled that even the weighty interests urged by the State in that case failed to meet this demanding standard. *Id.* As set forth below, the determination in *Florida Star* should lead this Court to rule similarly.

A. This Court's Jurisprudence Culminating in *Florida Star*

A trilogy of cases led to *Florida Star*. In each, a different state interest of substance was asserted as a basis for making truthful speech illegal. In each, the statute at issue was held unconstitutional. The first of the three was *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In that case, this Court considered the constitutionality of a Georgia statute that made it a misdemeanor to publish or broadcast the name of a rape victim. A reporter covering the underlying rape/murder trial had learned the name of the victim through examining the indictments that were part of the public record, and included the victim's name in a news report that was broadcast. *Id.* at 473-74. This Court noted the "powerful arguments" that could be made to protect the privacy of individuals and the "strong tide running in favor of the so-called right of privacy." *Id.* at 487-88. Nonetheless, in the "face-off" between the devel-

oping concept of privacy and "the constitutional freedoms of speech and the press" (*id.* at 489) rooted in the Constitution's protection of the "dissemination of truth," (*id.* at 491, quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964)), the Court resolved the conflict in favor of the First Amendment. Without reaching the ultimate issue of whether privacy interests could ever trump the right of the press accurately to report on matters of public concern, the Court held the statute unconstitutional on the ground that "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S. at 496.

In *Landmark Communications, Inc.* v. *Virginia*, *supra*, the Court again considered a clash between an asserted need for confidentiality and the First Amendment. At issue was Virginia's statutory scheme regarding judicial disciplinary procedures, which were deemed confidential by law until a formal complaint was filed. Virginia provided that "divulging" or "publishing" confidential information from the Judicial Inquiry and Review Commission by anyone, including third parties not themselves involved in the proceedings, was a criminal violation. 435 U.S. at 836. The rationale asserted for confidentiality was three-fold: to encourage the filing of complaints; to protect judges from the injury that might result from the publication of unwarranted complaints; and to protect judicial integrity. *Id.* at 835.

The *Virginian Pilot*, a Norfolk newspaper, published a truthful article about a pending confidential inquiry by the Commission into charges of incompetence made against a juvenile court judge. The article accurately named the judge under investigation and published a photograph of him. The material in the article about the confidential proceeding was based upon information pro-

vided it by unidentified sources who were themselves barred from revealing what they knew—including one that the article described as "a lawyer subpoenaed to appear at the hearing."[17] The newspaper was found guilty of violating Virginia law. *Id.* at 832. In striking down the statute, this Court concluded that: "[T]he publication that Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.* at 838.

A year later, in *Smith* v. *Daily Mail Publishing Co.*, *supra*, the Court addressed the constitutionality of a West Virginia statute that made it a crime for a newspaper to publish the name of a youth charged as a juvenile offender without the approval of the juvenile court. There, reporters for two papers, through interviewing witnesses, the police, and attorneys, learned the name of a youth charged with murder at a school and their newspapers published the youth's name. At the outset of its analysis, this Court noted that "[o]ur recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." 443 U.S. at 102. The Court then examined its decisions in *Cox Broadcasting*, *Landmark Communications*, and *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977),[18] and concluded that these cases:

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[17] *Landmark Communications* Appendix at 46a.

[18] In *Oklahoma Publishing*, this Court struck down a state court injunction prohibiting the news media from publishing the name or photograph of a young boy being tried in juvenile court. 430 U.S. at 311-12. The juvenile court had permitted reporters into the hearing where they learned the information, despite a state statute closing such trials to the public. *Id.* at 309.

> "suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."

Daily Mail, 443 U.S. at 103. The Court held that the state's interest in protecting the anonymity of youthful offenders—an interest that was not only of an immediate reputational nature but that related to the ability of the child to rejoin society after the imposition of any sanction imposed by the juvenile court—was not of sufficient magnitude when weighed against the First Amendment. *Id.* at 104.

In *Florida Star*, this Court again reviewed the constitutional principles set forth above within the context of a conflict between privacy and the First Amendment. In *Florida Star*, a newspaper reporter learned the name of a rape victim from a police report that was left by error in the police department's press room. The newspaper published a news account of the rape in its "Police Reports" section, including the name of the victim. A Florida statute at the time made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual assault. In a lawsuit brought by the victim, damages were awarded against the newspaper for negligently violating this provision. 491 U.S. at 528-29.

In holding that the Florida statute could not be applied consistent with the Constitution, this Court again articulated the First Amendment principle set forth in *Daily Mail* and its synthesis of prior case law: " '[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish the publication of the information, absent a need to further a state interest of the highest order.' " *Florida Star*, 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103). The Court found that interests said to be served by the Florida statute—the protection of the privacy of victims, the protection of the physical safety of victims, and the encouragement of victims to report such crimes (491 U.S. at 537)—were insufficient in the context of the case to constitute a state interest of such magnitude so as to trump the First Amendment. *Id.* at 537-41.

B. The Wiretapping Statute at Issue Is Not Narrowly Tailored to a State Interest of the Highest Order

Considering *Florida Star* together with the trilogy of cases that predated and led to it, it is apparent that the government cannot demonstrate that the imposition of civil and criminal sanctions in the wiretapping statute for any "use" or "disclosure" of any wiretapped information can pass constitutional muster.[19]

For one thing, the interests held insufficient to be characterized as state interest "of the highest order" in the cases we have just summarized are hardly less substantial than those asserted here. Consider the substantiality of the three interests asserted in *Florida Star* itself: the privacy of victims, the physical safety of victims, and the desire to encourage victims to report such crimes. This Court acknowledged their import while nonetheless concluding that "imposing liability for publication under the circumstances of this case" was "too precipitous a means of advancing these interests to con-

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[19] *See* 18 U.S.C. § 2511(1)(c)-(d) (1994). The Pennsylvania statute at issue is similar in all material aspects to the federal provisions; thus it will not be separately addressed.

vince us that there is a 'need' within the meaning of . . . *Daily Mail* . . . ." 491 U.S. at 537.[20]

Likewise, in *Cox Broadcasting*, the statutory and common-law provisions were strongly defended based upon the importance of protecting privacy interests. This Court noted that the privacy interests asserted "are not without force, for powerful arguments can be made . . . that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity." 420 U.S. at 487. Despite this interest and "a strong tide running in favor of the so-called right of privacy" (*id.* at 488), this Court sustained the First Amendment right to publish information located in official court records, even if sensitive, embarrassing, or otherwise protected from disclosure by state law. *Id.* at 496.

In *Daily Mail*, the Court considered the privacy-related interest of protecting the anonymity of the juvenile offender, as well as the related interest in rehabilitation of the youth. 443 U.S. at 104. While the Court did not question the preservation of anonymity as a matter of policy, it nevertheless held that "[t]he magnitude of the State's interest in this statute is not suffi-

[20] The Court in *Florida Star* provided as a related supportive citation the ruling in *Landmark Communications*, which it described parenthetically as "invalidating penalty on publication despite State's expressed interest in nondissemination, reflected in statute prohibiting unauthorized divulging of names of judges under investigation." 491 U.S. at 537-38. It is noteworthy that in *Landmark Communications* itself, Justice Stewart concluded that "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." 435 U.S. at 848 (Stewart, J., concurring). Justice Stewart then concluded that notwithstanding the significance of that State interest, the statute still could not be sustained.

cient to justify application of a criminal penalty to respondents." *Id.*[21]

Here too, we urge the Court to hold that the privacy interests asserted by Petitioners are not "narrowly tailored to a state interest of the highest order . . . ." *Florida Star*, 491 U.S. at 541. Not only are the interests asserted here no more powerful than those asserted in *Florida Star* and its companion cases—why, after all, is the right of a rape victim not to have her name disclosed *less* significant than that of a union official not to have a telephone call disclosed in which he threatened to engage in criminal conduct?—but for each of the following reasons, this is not the "extraordinary situation, if any" in which the First Amendment should be deemed to permit punishment of the publication of truthful information.

First, the legislative history of the wiretapping law leaves considerable doubt that Congress viewed the need to bar *publication* of wiretapped materials by third parties who did not themselves engage in the wiretapping as at all central to the achievement of the purpose of barring wiretaps themselves. Not a word of legislative history appears even to refer to the ban on disclosure of wiretapped data by third parties—media or otherwise. Not a word of that history asserts that to effectuate the

[21] The State interest was not insubstantial. West Virginia not only relied upon cases such as *In re Gault*, 387 U.S. 1, 24 (1967), which had stated that it was "the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past,'" Brief for Appellant at 12, *Smith v. Daily Mail Publishing Co.*, *supra* (No. 78-482), but an *amicus* brief of the Juvenile Defender Attorney Program argued that a ruling holding the State statute unconstitutional "would be a substantial set-back of the efforts of the State to foster rehabilitation of juvenile delinquents and to prevent future delinquency of countless thousands of children accused of acts of delinquency. . . ." Brief for *Amici Curiae* at 4.

purposes of barring wiretapping, it is necessary to ban publication by third parties of wiretapping materials. Not one example is cited in the legislative history of publication by a third party of wiretapped material that could be said to have caused the wiretapping in the first place. And there is no talk at all in the legislative history—as there is in the briefs of all the parties seeking to sustain the statute[22]—that a ban on publication is needed to prevent those who wiretap from "laundering" their criminal activities or to dry up the market for such communications.

The United States relies on a single page from the Senate Report to bolster its position.[23] But the entire paragraph from which the government's quotation is extracted makes plain that the Senate's expressed desire to deal with "all aspects of the problem" referred not to the use of unlawfully intercepted material but the statute's ban on the manufacture, distribution, possession and advertising of interception devices. *See* 18 U.S.C. § 2512.[24] Here, then, as was true in *Landmark Commu-*

[22] Private Petrs.' Br. at 37, 45; United States' Br. at 37-38.

[23] The United States' reference to the Senate Report was as follows:

> "In framing Title III, Congress concluded that merely prohibiting interceptions would not be sufficient. It observed that '*[o]nly by striking at all aspects of the problem*' could '*privacy be adequately protected.*' "

United States' Br. at 5 (quoting S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156) (emphasis added).

[24] The paragraph in its entirety, reads as follows:

> "Prohibition. Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. *An attack must also be made on the possession, distribution, manufacture, and advertising of interception devices. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected.* The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation."

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156 (emphasis added).

nications, the government "has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined." 435 U.S. at 841.

Second, the privacy interest said to justify the flat ban on *anyone* disseminating *anything* that *anyone* else said in an intercepted telephone conversation is fatally overbroad. The federal statute applies across the board to all who use the telephone, regardless of what they say or the circumstances in which they say it. It does not matter if the speakers are private or public figures.[25] It does not matter if what they are saying relates to matters of public concern or not. In this very case, it would not matter—and a jury would not even be permitted to consider—that threats of violent conduct were made. Nor is it relevant whether what has been said has previously been disclosed or whether the particular disclosure is one that a reasonable person would find highly offen-

[25] In the instant case, the two union leaders would likely be deemed public figures. *See Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, *amended by* 628 F.2d 932 (5th Cir. 1980) (union leaders held public figures), *cert. denied*, 450 U.S. 1041 (1981). *Compare Florida Star*, 491 U.S. at 550-51 (dissenting opinion of White, J. referring to rights of "wholly private persons").

sive. Just such overbreadth concerns led Judge Sentelle to conclude that the federal wiretapping statute violated the First Amendment under *Florida Star* in a companion case to this one. As stated by Judge Sentelle:

> "I can envision felonious eavesdroppers . . . obtaining . . . information of critical public importance about, for example, some public official's accepting a bribe or committing perjury or obstruction of justice. Even if those hypothetical felons dumped information of that critical nature . . . into the hands . . . of a newspaper publisher or a television news network, the public could never know of the wrongdoing, because under today's ruling, those news media would be barred from further publication of that information."

Boehner v. McDermott, 191 F. 3d 463, 484 (D.C. Cir. 1999) (Sentelle, J. dissenting), *petition for cert. filed*, 68 U.S.L.W. 3686 (U.S. Apr. 25, 2000) (No. 99-1709). The statute imposes strict liability on *any* publication so long as the publisher knows or has reason to know that the material stems from a wiretap. In doing so, the statute runs afoul of *Florida Star* itself, which made plain that in the effort to justify the "extraordinary measure of punishing truthful publication in the name of privacy" (491 U.S. at 540), "punishment may lawfully be imposed, *if at all*, only when narrowly tailored to a state interest of the highest order . . . " *Id.* at 541 (emphasis added).

More specifically, the Court in *Florida Star* observed that:

> "A second problem with Florida's imposition of liability for publication is the broad sweep of the negligence *per se* standard applied under the civil cause of action implied from § 794.03. Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive. On the contrary, under the *per se* theory of negligence adopted by the courts below, liability follows automatically from publication. This is so regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern—because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person."

491 U.S. at 539.

Precisely the same is true here. Whatever information was previously known, whatever the significance of the information, publication leads automatically to liability. This Court's conclusion in *Florida Star* is directly on point:

> "We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake. More individualized adjudication is no less indispensable where the State, seeking to safeguard the anonymity of crime victims, sets its face against publication of their names."

491 U.S. at 539-40 (internal citation omitted).

Third, there is no consensus amongst the states that in the service of preventing wiretapping itself, it is necessary to take the two separate steps of both criminalizing wiretapping *and* providing a civil remedy against third parties that publish wiretapped information. Of the forty-

eight states that ban wiretapping, eight have statutes that prohibit interception but not disclosure[26] and another eleven do not impose civil sanctions for disclosure.[27] The fact that these nineteen states (plus Vermont and South Carolina, which do not have statutes banning wiretapping at all) have not chosen to provide any civil remedy against third parties that disseminate wiretapped material gravitates against any finding that the state interest involved is of the "highest order."[28]

The wiretapping statute is not narrowly tailored to a state interest of the highest order within the meaning of *Florida Star*.

II. THE ARGUMENTS ADVANCED FOR SIDESTEPPING THE *FLORIDA STAR* ANALYSIS ARE WITHOUT MERIT

Petitioners attempt to avoid the inevitable outcome of any analysis applying *Florida Star* by focusing on two arguments. First, Petitioners argue that the *Florida Star*

[26] *See* Ariz. Rev. Stat. Ann. § 13-3005 (West 1999); Ark. Code Ann. § 5-60-120 (1999); Conn. Gen. Stat. §§ 52-570d, 53a-189 (1999); Ga. Code Ann. § 16-11-62 (2000); Mont. Code Ann. § 45-8-213 (1999); N.Y. Penal Law § 250.05 (McKinney 1999); S.D. Codified Laws § 23A-35A-20 (Michie 2000); Wash. Rev. Code Ann. §§ 9.73.030, 9.73.060, 9.73.080 (West 1999).

[27] *See* Ala. Code § 13A-11-35 (2000); Alaska Stat. §§ 42.20.310(a)(2), 42.20.330 (Michie 1999); Colo. Rev. Stat. Ann. § 18-9-303 (West 2000); 720 Ill. Compiled Stat. Ann. 5/14-2, 5/14-6(b) (West 2000); Kan. Stat. Ann. § 21-4002 (1999); Ky. Rev. Stat. Ann. § 526.060 (Banks-Baldwin 1998); Mich. Comp. Laws § 750.539h(b) (2000); N.D. Cent. Code § 12.1-15-02 (1999); Okla. Stat. Ann. tit. 13, § 176.3 (West 1999); Or. Rev. Stat. § 165.540 (1999); R.I. Gen. Laws § 11-35-21 (1999).

[28] *See Butterworth* v. *Smith*, 494 U.S. 624, 635 (1990) (stating that while practices in other states are not "conclusive as to the constitutionality" of a statute, they are "probative of the weight" of the state's interest).

line of cases is inapplicable because the statutes at issue there were content-based while the wiretapping statute at issue here is content-neutral. Second, Petitioners argue that the information was not lawfully obtained by Respondents Frederick W. Vopper, WILK Radio, and WGBI Radio. Both arguments are without merit.

A. The *Florida Star* Line of Authority is Based Upon the Overarching Public Interest in Protecting Truthful Speech

Nothing in the *Florida Star* line of cases indicates that the basis of the Court's decisions was concern about content-based restrictions on speech. The Court said nothing of the kind in any of the cases. In fact, the Petitioners' arguments to the contrary grossly undervalue the actual basis for these rulings. In the words of the Court in *Florida Star* itself, this line of authority is grounded in "the overarching public interest, secured by the Constitution, in the dissemination of truth." *Florida Star*, 491 U.S. at 533-34 (internal citation and quotation omitted).

The paramount importance of protecting—not to say honoring—truth-telling is deeply rooted in our Nation's history and culture,[29] as well as this Court's jurisprudence. Even so calamitous an assault on the First

[29] The protection of truthful speech long predates our own Constitution. As Professor Diane Zimmerman demonstrates in her much quoted and exhaustive analysis on the topic in *Requiem For a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983), "[t]he historical evidence suggests that the framers of the first amendment would have viewed restraints imposed by tort law on accurate speech—to the extent that they considered the matter at all—as inappropriate, and that the embarrassment that might result from true revelations was not considered a legal or compensable wrong." *Id.* at 311. *See also id.* at 306-08 (discussion of the Ninth Commandment, the Old Testament Book of Psalms, Roman law, ecclesiastical law and other bodies of jurisprudence).

Amendment as the Sedition Act of 1798, 1 Stat. 596, recognized truth as a defense. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 274 (1964). Under modern libel law, this Court has made plain that truth is an absolute defense in cases commenced by private figures as well as public figures. *Philadelphia Newspapers, Inc.*, v. *Hepps*, 475 U.S. 767 (1986). And this Court's landmark decision in *New York Times Co.* v. *Sullivan*, *supra*, itself demonstrates the overriding value placed upon truthful speech. It was only in the service of assuring that truthful speech not be limited regarding public officials that the Court announced the "actual malice" standard that provides some protection even for inaccurate speech. As part of the First Amendment's need for "breathing space," the Court explained that unless some false speech were protected:

> "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They [would] tend to make only statements which 'steer far wider of the unlawful zone.' "

376 U.S. at 279 (citation omitted). For the same reason, the "knowing or reckless falsehood" standard has been extended to the tort of publication of private facts where the material at issue concerns matters of public interest. *Time, Inc.* v. *Hill*, 385 U.S. 374, 387-88 (1967).

The essentiality of protecting truthful speech has also been recognized outside of the contexts of privacy and libel. Only truthful commercial speech is protected by the First Amendment. *See, e.g., Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980) ("For commercial speech to come within [the First Amendment], it at least must

concern lawful activity and not be misleading."). In *Butterworth* v. *Smith*, 494 U.S. 624 (1990), this Court held unconstitutional a Florida statute that prohibited a grand jury witness from revealing his own grand jury testimony. The Court emphasized the importance of protecting truthful speech in its ruling: "[O]ur decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Id.* at 634. *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (permitting truthful commercial speech in attorney advertising to overcome interest in maintaining professionalism of attorneys); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (striking injunction prohibiting truthful speech in the face of asserted national security interests).

Given the centrality of the protection of truth in the First Amendment jurisprudence of this Court, it is not surprising that one leading scholarly work has concluded that truth will "*always*" be "a defense in a defamation or right of privacy action—unless the [defendant] publishes confidential information that he has stolen." 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 20.36, at 495-96 (3d ed. 1999) (emphasis added). Another leading First Amendment scholar has interpreted this Court's case law similarly, observing that:

> "The dissemination of a fact that might otherwise be deemed private (and thus protected, for example, under a newly invigorated version of the tort of publication of private facts), will normally be deemed protected under today's First Amendment standards if the fact was 'lawfully obtained' by the person seeking to disseminate it. Thus, the press may publish private material leaked to it intentionally or through inadvertence, even though the person who leaked the material may have violated some legal duty."

Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 Geo. Wash. L. Rev. 1097, 1103-04 (1999).[30]

B. The Tape at Issue Was Lawfully Obtained by the Media Respondents

There can be no serious argument that the media respondents acted unlawfully in obtaining the tape at issue.[31] The media defendants did not wiretap the telephone conversation at issue. Nor is there any suggestion that the anonymous tapper was the agent of the media respondents. Instead, the media respondents simply received a copy of the tape-recorded conversation from

[30] Petitioners' focus on whether the wiretapping statute is content-neutral (a topic dealt with at length in the media respondents' brief) not only misses the driving force behind the *Florida Star* line of authority, but also overlooks a glaring failure of the statutory scheme. Even assuming that it is content-neutral, the statute simply prohibits "too much" speech. *City of Ladue* v. *Gilleo*, 512 U.S. 43, 53 (1994) (striking down ordinance restricting size of signs as applied to resident placing sign on lawn protesting the Persian Gulf war). In *Ladue*, this Court stated: "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* at 55.

[31] In addition to being lawfully obtained, in order to gain the protection of the *Florida Star* rule, the information at issue must be truthful and concern matters of public importance. There is no challenge to the truthfulness or the public import of the matters discussed on the tape—nor could there be. As the decision below noted, the "markedly contentious" negotiations between the teacher's union and the school district "generated significant public interest and were frequently covered by the news media." *Bartnicki* v. *Vopper*, 200 F.3d 109, 113 (3d Cir. 1999). Matters pertaining to governmental issues, such as taxation and public education at issue here, are at the heart of the First Amendment. *See, e.g., Mills* v. *Alabama*, 384 U.S. 214, 218 (1966) (a "major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs").

respondent Jack Yocum, who was himself the recipient of an anonymous tape left in his mailbox. Common sense dictates that the media respondents engaged in no unlawful behavior by simply receiving the tape; the wiretapping statutes at issue support this conclusion.

In conjunction with other parts of the wiretapping statute, 18 U.S.C. § 2511(1)(c) permits criminal and civil sanctions to be levied against anyone who:

> "intentionally *discloses*, or endeavors to *disclose*, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection."

Id. (emphasis added). Another provision addresses the intentional "uses" of the same information. *Id.* § 2511(1)(d). Significantly, the statutory scheme does not make unlawful the mere *receipt* of information obtained in violation of the wiretapping laws. *See Florida Star*, 491 U.S. at 536 (noting that Florida had not taken the step of proscribing the receipt of information). Thus, the media respondents obtained the tape lawfully and are fully deserving of the protection set forth in *Florida Star*.

Florida Star itself involved a similar, although not identical, scenario. There, under Florida law, police reports were not part of the "public record" open for inspection. 491 U.S. at 536. This Court remarked as follows:

> "But the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the fact that the [Police] Department apparently failed to fulfill its obligation under [the statute] not to 'cause or allow to be . . .

published' the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful."

Id. Thus, the Court held that the newspaper had lawfully obtained the rape victim's name notwithstanding that the police had "failed to fulfill" its own statutory obligations not to make the victim's name available. *Id.*

Petitioners argue that, even though the information may have been lawfully obtained by the media respondents, the press may still be sanctioned for publishing information that was illegally obtained by the original source, citing footnote 8 of *Florida Star*.[32] (Private Petrs.' Br. at 25-26; United States' Br. at 29.) If it determines to reach this question, *amici* urge the Court to rule that the press should not be equated with its ultimate sources.[33] Such a rule would run contrary to the First Amendment for at least four reasons.

First, the government has at its disposal the ability to punish the initial unlawful behavior, as well as anyone acting in concert with that person. Any subsequent attempt to punish speech (where the speaker is not connected in any way to the acts of the original actor) will necessarily be an overbroad attempt to redress the orig-

[32] Footnote 8 of *Florida Star* reads as follows: "The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuring publication as well. This issue was raised but not definitively resolved in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), and reserved in *Landmark Communications*, 435 U.S., at 837. We have no occasion to address it here." *Florida Star*, 491 U.S. at 535 n.8.

[33] It is undisputed that the media respondents' immediate source, Respondent Jack Yocum, did not engage in the original unlawful wiretap in any manner. Thus Yocum also received the information lawfully.

inal wrong—be it theft, breach of a seal of confidentiality, or, as in this case, unlawful wiretapping. *See Schneider* v. *State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). As Judge Sentelle explained in his dissenting opinion in *Boehner v. McDermott*, *supra*, a case also involving the federal wiretap statute at issue here:

> "I do not, however, see that either the United States or the State of Florida has established that an undifferentiated burden on the speech of anyone who acquires the information contained in the communication from the unlawful interceptor is necessary to accomplish the state's legitimate goal or narrowly tailored to serve that end. I do not see how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published it again. Not only is this not narrow tailoring, *it is not tailoring of any sort.*"

191 F.3d at 485 (emphasis added). Thus, Judge Sentelle concluded that the question reserved in footnote 8 of *Florida Star* must be answered "against the burdening of publication." *Id.*[34]

Second, punishing the press for publishing newsworthy, truthful information because the *source* of that information obtained it unlawfully will undoubtedly—and quite deliberately—lead the press not to publish such information. As a result, significant truthful information regarding public affairs and governance may

[34] For the reasons stated in Judge Sentelle's dissenting opinion in *Boehner*, the Third Circuit's decision below, and the media respondents' brief, the wiretapping statute fails intermediate scrutiny as well.

never come to the public's attention. *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Boehner*, 191 F.3d at 484 (Sentelle, J. dissenting). *See also supra*, at 3-5. Punishing the press for the publication of such information will necessarily deter the press from informing the public and preserving the free flow of information. *See, e.g., Mills*, 384 U.S. at 218-19 (noting major purpose of the First Amendment is "to protect the free discussion of governmental affairs" and that the press is "to play an important role in the discussion of public affairs").

Third, in its efforts to report the truth and inform the public, the press often encounters sources who may be disabled in some way by the law from passing along the information at issue. *See supra*, at 3-5. The Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), was one example. The *New York Times* received TOP SECRET information from a source that was not authorized to make it public and that the government later asserted had acted criminally in doing so. Nevertheless, the government failed in its effort to obtain an injunction to stifle the Times' speech, and there was no suggestion in any of the opinions accompanying the decision that the Times' receipt of the information was unlawful.

Landmark Communications, as well, is similar, as the identity of the judge being investigated there was originally known to only members of the Judicial Commission and participants in its activities, all of whom were obliged to keep such information confidential. The newspaper article at issue was based upon information obtained from unidentified sources including "a lawyer subpoenaed to appear at the hearing" who was obviously bound to secrecy. *Landmark Communications* Appendix at 46a. While the case focused on the issue of whether the newspaper could be criminally punished for publishing the name of the judge under investigation, there was never any suggestion that the mere acquisition of information permitting the newspaper to identify the judge could possibly be deemed illegal.

Finally, the very notion of equating the press with its sources and holding the former liable for the conduct of the latter is at variance with judicial as well as journalistic history. This Court has made plain that while the press may not be constitutionally entitled to gather certain information, what it does learn it may print. That is the essence of this Court's ruling in *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978), in which the Court, in determining that the press did not have a First Amendment right of access to prisons, stated that "the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal." *Id.* at 10 (plurality opinion of Burger, C.J., White, J., and Rehnquist, J.). This principle is also at the heart of Justice Stewart's similar distinction, quoted *supra* at 5, between the right of the government to deny access and the impermissibility of the press being punished for what it publishes.[35] *Cf.* Alexander M. Bickel, *The Morality of Consent* 79 (1975) ("under the *New York Times* case, if a newspaper had got hold of these documents without itself participating in a theft of them, although somebody else might to its knowledge have stolen them, it could have published them with impunity").

Thus the reasons set forth by Petitioners for removing this case from the *Florida Star/Daily Mail* framework are without merit.

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[35] *See also Landmark Communications*, 435 U.S. at 849 ("If the constitutional protection of a free press means anything, it means that the government cannot take it upon itself to decide what a newspaper may and may not publish.") (Stewart, J., concurring).

We offer the final thought that there is, in the end, a certain lack of equivalence between the First Amendment interests at stake here and the privacy interests that underlie the wiretapping statute. Both are important but only one is in the written Constitution. It should not be too late to assert that when the First Amendment's protection of truth-telling is pitted against an interest that was only first identified just over a century ago,[36] some deference should be given to the Framers' expressed intentions.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

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[36] *Compare* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) *with* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326 (1966).

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

The New York Times Company publishes *The New York Times*, a daily newspaper with a national circulation of 1.1 million daily and more than 1.7 million on Sunday. The company also owns the *Boston Globe* as well as twenty-one regional newspapers, many nationally circulated and distributed magazines such as *Golf Digest*, and eight television stations.

Advance Publications, Inc., directly or through subsidiaries, publishes daily newspapers in twenty-two cities and business journals in thirty-seven cities throughout the United States, as well as eighteen nationally distributed magazines (such as *The New Yorker*) and numerous World Wide Web sites.

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. It owns, alone or through its subsidiaries, the ABC Television Network, the ABC Radio Network, ten television stations, and forty-five radio stations.

Associated Press, the oldest and largest newsgathering organization in the world, is a not-for-profit mutual news cooperative that engages in the collection of news from and distribution of news to its members which include newspapers, television stations, and radio stations.

Cable News Network LP, LLLP, creates, produces and distributes nationally and worldwide thirteen networks which provide television programming services across dozens of platforms, including Cable News Network ("CNN"), Headline News, CNN International ("CNNI"), and CNN Interactive.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming.

CBS News produces morning, evening, and weekend news programming, as well as news and public affairs magazine shows, such as 60 MINUTES and 48 HOURS. CBS also owns and operates television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and ten other daily newspapers in California, Illinois, and Ohio, and operates Copley News Service, an international news service.

Gannett Co., Inc. is a nationwide news and information company that publishes ninety-nine daily newspapers, including *USA Today*. Gannett publishes a number of non-daily publications, including *USA Weekend*, a weekly magazine. The company also owns and operates twenty-two television stations and a national news service.

The Hearst Corporation publishes newspapers, consumer magazines, and business publications, owns a leading features syndicate, has interests in several cable television networks, and produces movies and other programming for television.

Knight-Ridder, Inc., the nation's second largest newspaper publisher in terms of circulation and revenue, publishes thirty-two daily newspapers and twenty-five non-daily newspapers in twenty-eight U.S. markets, reaching 8.7 million readers daily and 12.9 million on Sunday.

Magazine Publishers of America, Inc., founded in 1919, represents 250 of the largest magazine publishers in the United States, who collectively publish more than 1200 of the best known consumer interest titles, on a weekly, monthly, and quarterly basis.

The McGraw-Hill Companies, Inc., is a multimedia publishing and information company which publishes books and magazines, including *Business Week*, and also operates four local television stations.

National Broadcasting Company, Inc. operates a national television network of more than 200 affiliates and several owned-and-operated stations, through which it produces and broadcasts local and national news programming, such as DATELINE NBC. It also owns two national cable news networks, MSNBC and CNBC.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for eighty-seven percent of the U.S. daily newspaper circulation. One of the NAA's missions is to advance newspapers' interests in First Amendment issues, including the ability to gather and publish truthful newsworthy information of public significance.

Pennsylvania Newspaper Association is the official state trade organization for the newspaper industry in the Commonwealth of Pennsylvania. Its members include over 300 daily, weekly, monthly and college newspapers. It was founded eighty years ago and is considered one of the leading press associations in the nation, having an active membership, a staff of thirty-two and both a for-profit and a not-for-profit subsidiary.

Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives, educators, students and others in the radio, television, cable and online news business in over thirty countries.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors, dedicated to protecting the First Amendment interests of the news media and the public. The Reporters Committee has provided representation, legal guidance, and research in virtually every major press freedom case that has been litigated in the United States since 1970.

The E. W. Scripps Company is a diverse media concern with interests in newspaper publishing, broadcast television, cable television programming, and interactive media. Scripps operates twenty daily newspapers, ten broadcast TV stations and three cable television networks. The company also operates Scripps Howard News Service, United Media, a worldwide licensing and syndication company, and thirty-one Web sites.

Society of Professional Journalists ("SPJ") is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest consumer magazines in the United States, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Entertainment Weekly*. The company also publishes books under imprints including Warner Books, Little Brown and Time-Life Books.

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers, including the *Chicago Tribune*,

the *Los Angeles Times*, the *Orlando Sentinel*, and *Newsday*, owns and operates twenty-two major market television stations, and operates a network of local and national Web sites that ranks among the top twenty-five news and information networks in the United States.

The Washington Post Co. publishes newspapers and magazines of national interest such as the *Washington Post*, with a nationwide daily circulation of over 809,000 and a Sunday circulation of over 1.1 million, as well as *Newsweek* magazine.